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# Supreme Court of the United States

**October Term, 1972**

No. 72-667

THE SCHOOL BOARD OF THE CITY OF NEWPORT NEWS, VIRGINIA, ET AL.,
*Petitioners,*

v.

FRANK V. THOMPSON, ET AL.,
*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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THE SCHOOL BOARD OF THE CITY OF NEWPORT NEWS, VIRGINIA, ET AL.,
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FRANK V. THOMPSON, ET AL.,
*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

The School Board of the City of Newport News, Virginia, and George J. McIntosh; Superintendent of Newport News, Virginia, Public Schools, Petitioners (hereinafter referred to as School Board), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on August 2, 1972.

## OPINIONS BELOW

1. The opinion of the Court of Appeals filed August 2, 1972 (App. p. 1).

2. Opinion of the United States District Court rendered from the bench (App. p. 15) and the Order entered

pursuant thereto, said opinion rendered on August 12, 1971 and said Order entered on August 23, 1970 (App. p. 23).

## JURISDICTION

The judgment of the Court of Appeals was rendered on August 2, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## QUESTIONS PRESENTED

1. Is the equitable jurisdiction of the Court called into play at all, when the School Board, because of the existence of some all non-white or predominantly non-white schools, goes forward with the evidence and shows through uncontroverted facts and by way of uncontradicted evidence of expert witnesses that the separation of the races resulted from factors outside the control, power and authority of the School Board or any other governmental action?

2. Where the Supreme Court of the United States has held that a Freedom of Choice Assignment Plan is not unconstitutional, in and of itself, is not it error to summarily reject such a Plan without receiving evidence as to the manner in which it is implemented and the comparable degree of its success at integration since its inception?

3. A. Whether the expert medical evidence, showing the extreme length of the elementary school day, under the unique factors in Newport News, to be damaging to the physical and mental health of elementary students and that the result would be substantial impingement on the educational process of all such children, can be totally or partially rejected or ignored by the Court when such evidence is reasonable, believable, uncontradicted and not in conflict with any evidence in the case?

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B. Whether uncontradicted expert educational evidence that the required Plan would significantly impinge upon the educational process may be totally or partially rejected or ignored by the Court?

C. Whether uncontradicted evidence by an expert historian showing plainly the reason for separation of the races to result from other than governmental action can be totally rejected or ignored by the Court?

4. Whether the Assignment Plan required is within the guidelines prescribed by the U.S. Supreme Court when the expert evidence of a traffic engineer shows unequivocally and without contradiction or conflict that because of the unique size and shape of the City, coupled with lack of available routes and extreme traffic congestion, the Assignment Plan endangers the lives of the children being subjected to its implementation?

5. Whether the mere former existence of a Virginia Statute separating the students by race coupled with the existence of some, all or predominantly black or white, schools show vestiges of a former dual system of schools?

6. Whether the fictional and illusory distinction between "de jure" and "de facto" segregation should be rejected and abolished.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

## STATEMENT OF THE CASE

### 1. Introduction

The Petitioners are seeking a review of an en banc decision of the U.S. Court of Appeals for the Fourth Circuit,

affirming, in part, and remanding, in part, an Order of Honorable Walter E. Hoffman, Chief Judge of the Eastern District of Virginia, which held in pertinent part that the School Board must zone, pair and crossbus children in grades three (3) through twelve (12) to achieve substantially a racial balance proportionate to the existing black to white school age population.

To assist the Court, Petitioners have included in the Appendix the Plan of Operation of Newport News School System, Plan I (described at App. p. 25 and shown on map and document at Appendix of Exhibits pp. 3, 9, 10 and 11); and Plan II (described at App. p. 25 and shown on map at Appendix of Exhibits p. 2 for intermediate and high schools and p. 3 for elementary schools); Enrollment by Race—October 1970 (App. p. 26); Elementary School Plan—Enrollment by School and Race—June 1971 (App. p. 27); Administration of Zoning Plan (App. p. 28); Secondary School Organization 1971-72 (App. p. 30 and Appendix of Exhibits p. 2) and Enrollment by Grade and Race of Intermediate and High Schools—June 1971 (App. p. 34).

The Plan imposed by the Court, requiring cross-busing throughout the City of elementary students, achieves the race balancing shown at Appendix p. 34 and Anticipated Enrollments 1971-72—Zone—Pairing Plan (App. p. 36). The zones to be paired under Court imposed plan are shown as Supplemental Plan for Desegregation of the Newport News Elementary Schools (App. p. 35) and on the map in Appendix of Exhibits p. 12.

Appendix of Exhibits, p. 1, shows the physical characteristics of the City, the traffic arterial layout and the distribution of the population by race. The charts at pp. 5, 6, 7 and 8, Appendix of Exhibits, show the traffic problem and dangers thereof at the two congested intersections through which all busses must pass.

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**2. Proceedings Below**

This was a class action for further integration of the Newport News School System instituted by Frank V. Thompson, et al., in the United States District Court for the Eastern District of Virginia.

The case was commenced on July 23, 1970. The Complaint, in essence, alleged: that prior to 1954 a bi-racial school system was required by law throughout the Commonwealth of Virginia; that racial discrimination prevailed in the system; that the School Board had failed and refused to convert to a unitary non-racial system and that, in at least one school, indicia of a school specially set apart for Negro children remained.

The School Board answered, admitting the eixstence, prior to 1954, of the legal requirement for separate schools throughout Virginia and responded affirmatively that any current separation of the races resulted directly from housing patterns and other factors totally unrelated to any prior law and denied the existence of a dual school system or discrimination and the existence of any school set apart for Negro children.

The District Court, on October 29, 1970, deferred proceedings herein pending the Supreme Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 91 S.Ct. 1267 (1971) and on May 13, 1971, entered an Order requiring that all requests by Plaintiffs for further relief be filed by June 1, 1971. The Plaintiffs on June 1, 1971, filed a motion for permanent injunction which in essence alleged that *Swann* required the relief originally prayed for and prayed that plans be submitted to the Court by the School Board. The School Board responded, denying the existence of any discrimination; stating that any separation of the races was due to factors for which the Court was neither

empowered nor required to grant relief and that the plaintiffs were not entitled to the relief sought.

On June 16, 1971, the District Court conducted a pretrial conference for the purpose of setting dates for submission of school plans and objections thereto, at which time the Court discovered that the School Board had on June 14, 1971, delivered its Operational Plans to the Clerk. Two Plans were submitted, as follows:

PLAN I (App. p. 25)

This plan proposed for high schools the continuation of the Freedom-of-Choice Plan, with an additional requirement that in case of overcrowding, pupils in the racial majority would be required to make a second choice according to distance from school. For elementary schools, Plan I proposed, generally, a neighborhood concept and to increase desegregation certain schools were paired, zone lines were gerrymandered and grade levels in some schools were rearranged.

It took into consideration numbers of children living in each of the zoned areas and the corresponding capacities of the schools, the natural boundaries of the City and, wherever possible, traffic patterns. The neighborhood zones are drawn in a contiguous manner based upon school capacity, but in such way as to give as great a black-white mix as possible. In some instances the grades were restructured in order to give a better black-white mix.

PLAN II (App. p. 25)

This Plan was submitted at the same time as Plan I conditioned upon it not being considered until evidence was presented and trial conducted on Plan I but to show the continuing good faith of the School Board. Plan II provided non-contiguous zones for high schools (grades 10, 11 and 12) and intermediate schools (grades 8-9) and provided the neighborhood concept

for elementary schools. It divides the City into seven zones, three of which cover the predominately non-white section in the former City of Newport News, three of which cover the area from the northerly boundary of the former City of Newport News to Denbigh Boulevard, a major east-west artery in the far northwesterly part of the present city and in which area the bulk of the white population is housed. Another zone covers the area north of Denbigh Boulevard and includes the Military Reservation, Ft. Eustis. The students have been divided into two age-grade levels. Grades 8 and 9 are taught in the intermediate schools which are located primarily in the southerly end of the City and grades 10, 11 and 12, the high school grades, are taught in the high schools and are primarily located in the center and northerly part of the City. The zones were paired in such a way as to provide for a distribution of the concentrated black population from the southerly part of the City (former City of Newport News) for attendance at the high school level and for distribution of the white population into the southerly area for grades 8 and 9.

The Court, at the pre-trial conference, summarily rejected the Freedom-Of-Choice Plan, stating that the black-white ratio was the sole criterion necessary for decision.

Trial was conducted on August 4, 1971, at the conclusion of which the District Court rejected the neighborhood elementary plan and ordered the School Board to submit another elementary plan and indicated what the plan should accomplish.

On August 6, 1971, the School Board submitted a plan for the elementary system which retained neighborhood schools for grades one (1) and two (2), and pursuant to the District Court's instructions, required a massive cross bussing of elementary students in grades three (3) through seven (7) and which restructured the grades within the

elementary schools. Upon submitting this plan, it was made clear that it constituted the plan of the School Board only insofar as it applied to grades 1 and 2, and that otherwise it was submitted under order of the Court along its guidelines and therefore constituted the Court's plan to which the School Board objected.

The District Court approved the high school-intermediate school Plan II and the supplementary elementary Plan required by the Court and required their implementation.

All parties filed cross appeals. The School Board based its appeal upon the failure of the District Court to properly apply the requirements of the Constitution of the United States, applicable law and guidelines prescribed by the Supreme Court of the United States as to the required assignment plan for grades three (3) through twelve (12). The Respondents based their appeal upon the same as to grades one (1) and two (2).

By opinion dated August 2, 1972, the United States Court of Appeals for the Fourth Circuit rejected the position of the School Board and neither accepted nor rejected the respective positions of the parties as they related to the neighborhood school plan approved for grades 1 and 2, but remanded the case to the District Court with instructions to allow in evidence a plan for all elementary schools, including grades 1 and 2, which was offered by Plaintiffs in evidence, but rejected by the District Court and for consideration to be given to reasonable alternative plans which would achieve a greater degree of segregation. The Court of Appeals also instructed the District Court to consider whether or not any discrimination entered into the method of implementing the elementary cross-bussing plan involving grades 3 through 7.

### 3. Facts

The present City of Newport News was formed in June, 1958, by the consolidation of the City of Warwick, Virginia, and the former City of Newport News, Virginia. The School District boundaries presently are coincident with the boundaries of the present City and formerly there were separate districts for the two former cities. The former City of Warwick was predominantly white and the former City of Newport News was predominantly black. The former City of Warwick contained 60 square miles and was mostly undeveloped. The former City of Newport News contained 4 square miles and was practically fully developed and included substantially all of the business and industrial development serving both the former cities of Newport News and Warwick.

The former City of Newport News was located at the far southerly tip of the Virginia Peninsula and the former City of Warwick was to the northeast of the old city. The consolidation of these areas into the present City of Newport News in June 1958, resulted in a School District and port city, "cigar-shaped", twenty-two (22) ± miles in length and varying in width from seven-tenths (0.7) of one mile at its narrowest point to six (6) miles at its widest point (which point includes the large military reservation, Ft. Eustis). The resulting new City is bounded totally on its westerly side by the James River, on its southerly side by the Port of Hampton Roads, on the east by the City of Hampton, Virginia, and on the northeast by the counties of James City and York. This long, narrow City is bisected by the tracks of the Chesapeake and Ohio Railroad Company and the City is served by only two major north-south traffic arteries.

The consolidated City has a population of approximately 135,000. Over 80 percent of the non-white population resides in the former City of Newport News at the very southerly tip of the City. As of October 1970, non-whites constituted 36 percent of the total elementary school population and 36.9 percent of the high school population. There were 32 elementary schools, 13 of which were located in the former City of Newport News. There were 7 high schools, 2 of which were located in the former City of Newport News.

Mr. George J. McIntosh, Superintendent of Newport News Public Schools, was presented and qualified as an expert on the historical development of the City of Newport News and as an expert on the Newport News school system. He described the development of the former City of Newport News (the 4 square mile area located at the southeasterly end of the Peninsula), beginning in 1880 when the title to the property for the development of the C & O Railroad was acquired. He described the 1888 birth of the Shipyard, which is the present Newport News Shipbuilding and Dry Dock Company (the largest privately-owned Shipyard in the world), and how people were brought into the City from all over this country and from Europe to serve these two new industries. The former City was incorporated in 1896 and in 1910 its population had zoomed to 20,000 people.

By World War I, the population increased, almost overnight, to 35,000 people practically all of whom were concentrated in the lower end of the Virginia Peninsula which was formerly the City of Newport News.

After World War I, many of the people left and there was a gradual development again until World War II when suddenly the lower end of the Peninsula (the former City of Newport News), zoomed in population to 43,000 people

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and after World War II, instead of that population leaving the area, the development of housing sections in what was then Warwick County started and there was a gradual migration of white population up into the County and a migration of non-white population into the Old City of Newport News, close to the C & O piers and the Newport News Shipbuilding and Dry Dock Company.

In 1930, the population of former Newport News was approximately 60 percent white and 40 percent non-white. In 1960, two years after consolidation, the housing were reversed to 60 percent non-white and 40 percent white. By the year 1970 the housing trend continued with a migration of the white population north and the migration of the black population south to the extent that the population ratio in the Old City of Newport News was then 90 percent non-white.

With the Chesapeake and Ohio Railroad yards and coal piers, all of the Shipyard activities and the downtown business section being located in the former City of Newport News, the residential area is small and densely populated.

Mr. George J. McIntosh testified that the Plans imposed by the Court would significantly impinge upon the educational process. He also gave his expert opinion that any separation of the races was the direct result of the historical development of the housing patterns and was unrelated to the former existence of a statute.

To remove the concentrated black population out of the southerly tip of the City and the concentrated white population into the corresponding area, the travel time necessary is a minimum of forty minutes and a maximum of one hour, twice a day. Such time consuming bus runs are necessary in order to mix the black-white school population because of the uniqueness of the distribution of the popu-

lation in the City, combined with the unusual physical characteristics of the City, the recognition of which the Court of Appeals devoted most of its opinion to in this case.

John R. Hogg, M.D., testified as an expert pediatrician. He stated that given the length of the school day with the long-distance bussing at the beginning and end of the school day for grades 1 through 7 it would result in both mental and physical harm to that age group. The doctor's uncontradicted testimony showed that the resulting harm would be present in the short run and as time passes, the effect will be even more pronounced. He stated that both the health of the children would be affected and that the educational process would be significantly impinged upon.

Mr. William H. Gordon, the Newport News Traffic Engineer, testified as to the complex problems of traffic movement from one end to the other of the long, narrow City, over only two major north-south traffic arteries and the accident incidence at the time school buses were required to be increased on these arteries.

The Plans ultimately required by the Court require massive cross-bussing of children of all ages necessarily through one of two of the most accident prone intersections of the City at peak traffic times.

The racial mix under the Court ordered Plans is approximately 60 percent white and 40 percent Negro in all high schools except Denbigh High School where it is 82 percent white and 18 percent black. In elementary schools, excepting grades 1 and 2, it varies from 15.2 percent Negro to 49.6 Negro, but approximates 65 percent white and 35 percent Negro in most instances. When grades 1 and 2 are included, it varies from 15.6 percent Negro to 64.8 percent Negro and approximates 62 percent white and 38 percent Negro.

The location of a high school in the southern end of the

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City would encourage and produce wholesale resegregation.

No medical or other expert testimony was offered by Respondents.

## REASONS FOR GRANTING WRIT

### A. Swann's Conditions Precedent To Implementation Of Bizarre Bussing Requirements Must Be Carefully Examined Before Remedies Are Available.

#### I. Introduction

The *Swann* case, *supra,* although more definitive of the legal requirements in school desegregation cases than any previous cases, leaves much to be desired in that area. This Court attempted to give general guidelines for cases in which certain necessary elements were present to bring the particular case into the context of *Swann, supra.* There was no attempt to set rigid rules for particular cases, rather an approach to define for School Boards the general rules with certain exceptions and modifications in particular instances was undertaken.

*a. The Requirement That a Dual System of Schools Exists, Prior to Fashioning of Remedies Is Too Often Overlooked.*

There must be in existence a dual system of schools to give rise to rights and/or remedies. Remedies are not available where there is no violation. This Court said in *Swann, supra:*

> "... Once a *right and a violation* have been shown, the scope of the district court's equitable powers ... is broad ..." (emphasis added)

Many factors are necessarily to be considered in deciding the "dual" vs. "unitary" question. Burden of proof, good

faith implementation of *Brown I*[1] and *Brown II*,[2] the effect of statutes separating school children by race, the factual situation existing including the black-white composition of the schools, and irrespective of all of the above, the real reason for the present racial makeup of the schools, are all factors to be considered.

The evidence in individual cases must be carefully examined to determine the enumerated factors. Too often the Courts fail in their duty to totally examine these factors. This results in difficulty as to analysis of the Courts' conclusions and leaves the school boards in a state of confusion regarding their duties. Very often scholars of constitutional interpretation are found also in a quandary. Apparently, much of this confusion comes about because the Courts begin desegregation opinions with quotations of existing, racial percentage figures as though such figures, without more or together with only a showing of a former statute separating the races, give rise to a right which requires a remedy. The School Board submits that such an approach is erroneous and should *now* be corrected.

*b. Remedies Are Limited Where a Dual System Exists When Practical, Health and Educational Problems Are Present.*

Given the existence of a dual system of schools, (the absence of which will later be discussed herein) *Swann, supra,* limits bizarre bussing methods under certain circumstances.

The limiting factors are all relevant to the proper approach to this case. Additionally, an analysis of limitations on Federal Courts by virtue of the Emergency School Aid Act[3]

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[1] *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

[2] *Brown* v. *Board of Education*, 349 U.S. 294 (1955).

[3] Emergency School Aid Act, Public Law 92-318, 92nd Congress, 5.659, (June 23, 1972).

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and the question of discontinuing the illusory distinction between "de facto" and "de jure" segregation must be accomplished.

## II. The Evidence Shows a Unitary School System, Therefore No Violation is Present and It Necessarily Follows That the Equitable Power of the Court to Fashion Remedies Was Not Called Into Play.

A discussion of the supposed dual system of schools requires a reasonable analysis of the evidence presented by all parties and findings must be made based upon an application of the rules of evidence and burden of proof established by this Court. The evidence presented herein shows plainly that there is no dual system of schools.

The position of the School Board in this respect is as follows:

One: The burden of proof has not been carried to show the existence of a dual system.

Two: The burden of going forward with an explanation for the existence of some predominantly, or all, black or white schools has been carried by the School Board and the evidence shows there is no violation.

Three: The former existence of a statute separating the races in public schools does not, in and of itself show the existence of a dual school system.

Four: The fictional, illusory and sectionally applied distinction between "de jure" and "de facto" segregation should be abolished and forever put to rest, thus permitting this case, and similar cases, to be decided without social illusions and fictitious ideas and to eliminate an application of the Equal Protection Clause of the Constitution of the United States in a manner violative of the very clause being applied.

*a. Burden of Proof*

The traditional rules of burden of proof would require the moving party to prove the existence of a dual system of schools. This traditional rule has been tempered somewhat by this Court by its pronouncement in *Swann, supra,* as follows:

> "The record in this case reveals the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city. . . . No per se rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. *Where the . . . plan for conversion from a dual to a unitary system* contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely nondiscriminatory. . . . the burden upon the school authorities will be to satisfy the court that the racial composition is not the result of present or past discriminatory action on their part." (emphasis added)

Taking the quotation in its context, under factors in *Swann, supra,* it should be remembered that the parties conceded the existence of a dual system. It is readily apparent that the emphasized portion of the quotation directs itself to a plan of conversion from a dual to a unitary system.

The evidence in this case shows that the separation of the races did not and does not result from any discriminatory action. The uncontradicted evidence is that the separation is the direct result of residential housing patterns which

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developed over the years from industrial development in and around the black concentrated area. Somewhat akin to requirements of integration of schools across municipal boundaries is found in that the present City of Newport News is the result of the consolidation, in 1958, of a predominantly black, very small city with a predominantly white, very large city. The residential patterns were already established long before consolidation. The predominantly black city was substantially fully developed and the predominantly white city was substantially undeveloped. Since consolidation, the movement of whites and blacks is necessarily into the predominantly white larger city.

The general housing pattern trend, coupled with the consolidation created the school "problem" as it is seen in the context of this case.

Here there is no concession of the existence of a dual system of schools. The system is unitary insofar as legal requirements are concerned, although some all, or predominantly, one race schools exist.

The evidence, previously cited, uncontradicted, shows that this case does not involve a ". . . plan for conversion from a dual to a unitary system."

The only fair interpretation of the evidence requires a finding that a unitary system of schools exists.

School desegregation cases notoriously contain nebulous language describing the necessary mandate such as a "a plan that promises realistically to work, and ***to work now." And the terms, "feasible," "workable," "effective" and "realistic" are found. (*Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968)). However, as the Court said in *Swann,* "substance, not semantics, must govern and we have sought to suggest the nature of limitations without frustrating the appropriate scope of equity."

What is a plan that promises realistically to work? Pre-

sumably, the reference is to a plan that promises realistically to eliminate a dual system of schools.

Admittedly, there formerly existed a law throughout the Commonwealth of Virginia requiring the separation of the races. That such law existed does not constitute a showing of a dual system. The School Board carried the burden of showing that any separation of the races was not the result of the previous existence of such law. "Substance, not semantics must govern." The substance, rather than the words of a former law, with reference to a dual system of schools was presented by George J. McIntosh in his testimony describing the historical development of the present City of Newport News from 1880 to the date of the trial of this case. He described the development of the population patterns of the Old City of Newport News as they related to the necessity for an increased work force in the Shipyard during war time; the development of the Old City into a business and industrial area and the migration of white population to the northern part of the present city and a migration of the non-white population over the years into the area which formerly was the Old City of Newport News. He described the black-white population mix in 1930 as 60 percent white, 40 percent non-white in the Old City of Newport News and in 1960 a reversal to 60 percent non-white and 40 percent white. By 1970, the same area had become better than 90 percent non-white.

Mr. McIntosh, when asked whether or not he had an expert opinion with reference to the reason for the separation of the races in the School System, replied:

> "... the separation in the schools is a direct result of the separation in the housing patterns in the City. People have—or now attending generally, through their own choice, schools closest to their places of residence." (App. 31)

In *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969), the Court described a unitary system of schools as one "within which no person is to be effectively excluded from any school because of race or color."

The Freedom-of-Choice Plan and the Neighborhood Zoning Plan, designated as Plan I meets that test squarely. The position is bolstered by the fact that the present City of Newport News is the result of a consolidation of predominately black small City with a predominately white large City. The former law cannot be said to have separated those persons located in the predominantly black Old City from those located in the predominately white new City. Yet this is precisely what the lower Court has erroneously held.

A comparison of the local circumstances with the circumstances existing in New Kent County, Virginia, at the time of the decision in *Green,* combined with the limitations pronounced in the *Green* decision show the School Board's plan, Plan I, to be constitutional and not proscribed by the classic Freedom-of-Choice Case mentioned.

In *Green* the opinion is limited to the circumstances in that case and this fact is emphasized in the first sentence of the opinion, which begins,

> "The question for decision is whether, *under all the circumstances here,* respondent School Board's adoption of a 'freedom-of-choice' plan which allows a pupil to choose his own public school constitutes adequte compliance with the Board's responsibility to achieve a system of determining admission to the public schools on a non-racial basis."

The circumstances contrasted are as follows:

| NEWPORT NEWS | NEW KENT COUNTY |
|---|---|
| A. 39 schools in system | A. 2 schools in system |
| B. 31,000 students | B. 1,300 students |
| C. Approximately 35% Negro Population | C. 50% Negro population |
| D. 80 to 90% Negro population concentrated at southern tip of 21 mi. x 3 mi. City | D. No residential segregation persons both races reside throughout Cou |
| E. Population approximately 135,000 | E. Population 4,500 |
| F. Urban area with only two major north-south streets for access through the narrow City, with major traffic problems | F. Rural area |
| G. Approximately ⅔ of schools integrated through utilization plan | G. One black school—one white sch |
| H. Choice of school must be made by all | H. If choice not made, automatic assigned to last school attended |

The School Board says unto the Court that the unique circumstances and physical layout existing in the City of Newport News and the method of employment of the freedom-of-choice plan is non-racial and does not "effectively exclude" anyone from any school based upon race. There simply is no discrimination in the Newport News School System.

The affirmative gerrymandering of zones under the neighborhood elementary concept portion of Plan I accomplishes all that can be accomplished, given the population distribution which plainly results from things other than an ancient law. Constitutional construction, not retaliatory action is the objective sought.

The plans imposed upon the School Board constitute a forced attempt to balance the races in the school system in the City of Newport News, which is not required under any

circumstances and in particular in a case where there has been a showing that a unitary system of schools was being operated in the City.

The Court said in *Green,*

> "We do not hold that a 'Freedom-of-Choice' Plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that in desegregating a *dual system* a plan utilizing 'Freedom-of-Choice' is not an end in itself." (Emphasis added)

*b. The "Distinction" Between Defacto-Dejure School Systems is Fictional and Illusory and Should not be Resorted to by the Courts.*

*—Absent such Distinction There is no Dual System of Schools in Newport News—*

In *Taylor* v. *Board of Education,* 294 F.2d 36 (2d Cir. 1961), the Court stated that one distinction between defacto and dejure school segregation was whether "race was made the basis for school districting with the purpose and effect of producing a substantially segregated school." In *Moses* v. *Washington Parrish School,* 276 F. Supp. 834 (E.D. La. 1967), the Court said, ". . . dejure segregation means simply segregation . . . that is forced, purposeful separation of the races."

Neither of these conditions exist in the City of Newport News. The uncontradicted evidence indicates that the separation of the races is the effect of housing patterns and the growth of two Cities later consolidated into one. The uncontradicted evidence shows that there is no "forced, purposeful, separation of the races."

The School Board respectfully submits that there is no logical reasoning to support a finding of the existence of a

dual system of schools in the Defendant's school district. There is no valid reason to apply an illusory "distinction" between defacto-dejure segregation, (in particular by a fiction through the semantics employed in a former law) when the evidence indicated the separation of the races to be a result of factors other than the law. There can be no more reasoning to such an application than to apply the anti-black voting laws which removed a large block of votes which potentially could have been utilized to implement desegregation statutes such as open housing and mandatory school integration to such cases. Surely no Court would attempt such reasoning.

Furthermore, the "distinction" between dejure and defacto segregation obviously constitutes a discriminatory application of the Equal Protection Clause of the United States Constitution, amendment 14, section 1.

The record in this case indicates that any segregation existing in the School System, was innocently arrived at, and therefore is constitutionally permissible.

The admonition by Judge Gewin in *U.S.* v. *Jefferson County Board of Education,* 38 F.2d 385 (1967), in dissent, is very cogent and to hold counter to his remarks is indeed *frightening.* He stated:

> "... when our concepts as to proportions and percentages are imposed on school systems, notwithstanding free choices actually made, we have destroyed freedom and liberty by judicial fiat; and even worse, we have done so in the very name of that liberty and freedom we so avidly claim to espouse and embrace..."

*c. Neither a Right nor a Violation Has Been Shown.*

*Swann, supra,* requires a showing of a right and a violation before the District Court's Equitable powers are called

into play. There has been no showing in this case of a violation and therefore the equitable powers of the Court were not called upon. The evidence herein indicates that were such powers called into play, the discretion was erroneously exercised, and failed to take into consideration the unique circumstances thus imposing upon the School Board the very requirements proscribed by *Swann, supra.*

We urge upon this Court to hold that the replacement of the "deliberate speed" doctrine with the "desegregate now" doctrine does not mean to abandon the concept of education at all costs and to place at the top priority the mixing of bodies based on the color of their skin. The *Swann* case recognizes this opportunity and the District Court should be ordered to look closely at all the circumstances existing in the locality, not limited to a sole criterion of a black-white mix. The Court should abolish the illusory dejure-defacto "distinction."

**B. Swann Proscribes Bussing of Elementary Students With The Circumstances, Conditions And Results In The Newport News School System Whether Or Not A Dual System Exits.**

1. ADVERSE EFFECT UPON HEALTH OF STUDENTS AND SIGNIFICANT IMPINGEMENT ON EDUCATION PROCESS ARE BOTH PRESENT

Irrespective of a determination of the existence or non-existence of a dual system of schools, *Swann, supra,* guidelines show that the elementary plan imposed by the District Court constitutes an abuse of equitable discretion and is violative of those guidelines.

The Supreme Court said in *Swann:*

> "An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process. *** It hardly

> needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students." (91 S.Ct. 1267, 1283)

The travel time necessary is a minimum of forty minutes and a maximum of one hour, twice a day, to remove the concentrated black population out of the southerly tip of the City and the concentrated white population into the corresponding area. The uniqueness of the distribution of the population in the City, combined with the unusual physical characteristics of the City, which are recognized for the first time by the Court of Appeals, constitute the reason.

As Mr. McIntosh said:

> "In order for a cross-bussing plan in Newport News to work on or in any community to work, it is necessary, of course, to bus children from the highly concentrated non-white areas to the white areas and vice versa. Now, with all of the concentration in Newport News being at one end, in order for a cross-bussing plan to produce results in this case it is necessary to involve all or nearly all, of the other elementary schools, and therefore it becomes a matter of bussing from the extreme south east end of the city through the entire length of the city and vice versa. There are no areas scattered throughout the city of any consequence to provide this necessary mix. It must all come from one area."

After the above statement, the District Court Judge questioned the Superintendent of Schools with reference to at least breaking up some of the predominately black schools in the lower end of the city and the Judge suggested that possibly five or six of the eleven schools in the lower end of the city could be broken up and asked the witness if that could be done. Mr. McIntosh replied that to attempt to break up only part would invite further movement of people

and resegregation. He further explained that if from the center of the city southwardly were sought to be desegregated there would not be any substantial absorption of the black population and this would result in all or most of the schools having a majority black. He reiterated that that would be detrimental to the educational process and would promote further separation of the races and movement of persons.

The elementary school day consumes six hours and twenty minutes of in school time and is coupled with the exhaustive and illogical travel time factor mentioned above.

Regarding such a day, Dr. John R. Hogg, a pediatrician of substantial background and expertise, described the effect on children of tender years in grades one to seven who would be required to begin a day prior to 8:00 A.M. with a bus trip to a school which takes an average of forty to forty-five minutes, with an average distance of travel with 11.2 miles, one way, and a six hour twenty minute school day, capped at the end with a return trip by bus consuming from forty to forty-five minutes and representing a day that ends back at home at approximately 4:15 to 4:30 P.M., for a day approximating seven hours and fifty minutes.

Dr. Hogg said:

> "In my opinion, that would be detrimental to the health of the child over the short run and, most definitely over long run. This detrimental effect on the health of this child is obviously going to affect the learning process; it is going to affect the educational process."

The Doctor went on to explain that the physical fatigue factor solely due to the duration of such a day would be detrimental to the health of the child and impingement upon the educational process would result. Furthermore,

mental fatigue would further compound the effect on the educational process. The Doctor stated unequivocally that the resulting mental and physical fatigue and the impingement upon the learning process would be cumulative. He said that the earlier the child is subjected to these circumstances, the more indelible it would imprint itself upon the child.

Dr. Hogg related:

> "... it cannot help but produce an irreversible state insofar as the child's health is concerned ... I think one would have to say unequivocally this would be a permanent effect on the child."

With reference to the effect of the fatigue factor and the results thereof as they relate to the abilities of elementary students to properly perform their home study, the doctor said:

> "It is hard to conceive of a six, or seven, or eight year old, or actually anyone in the elementary levels being subjected to a seven hour and fifty-minute day and then coming home and eating and trying to get the proper rest and successfully or adequately perform his home study duties ..."

The effect of the cross bussing plan on elementary students from a health and education standpoint was described by Dr. Hogg in response to a question as to whether or not it would significantly impinge upon the educational process, as follows:

> "First and foremost, I think it is going to impinge upon the health of the child ... Not given optimum health conditions or given a child who has had his health impinged upon, ... He is going to have the learning process or educational process impinged upon at the same time ... In my opinion, this long day

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> would be detrimental to the health of the child and subsequently detrimental to his educational process. . . . I think it is significant, yes."

The District Court's Opinion from the Bench, regarding the medical evidence was as follows:

> "On this record we have the undisputed testimony of Dr. Hogg, a thoroughly qualified pediatrician, to the effect that children will be adversely affected by the approximate one hour and a half additional bus riding to and from various schools and as Dr. Hogg indicated this would carry on through those in the entire elementary system, but he was very candid to indicate that the effect upon any child, as the child grew older, would be definitely lessened."
>
> "This is occasioned by not only the *health* and *mental processes* of the child but also by reason of the fact that to move the child a considerable distance from the school removes the parental participation that is so necessary in getting a child started in school. It eliminates any after school activities by reason of the extended period of the child attending school." (Emphasis added)

The Defendants are unaware of any other school desegregation case in the entire United States where medical evidence was presented to substantiate the fact that the health of the child would be affected *or* that the educational process would be significantly impinged upon. ***Both*** of these factors exist in the City of Newport News and constitute a legal and constitutional objection to the erroneous actions of the District Court in imposing the elementary plan currently in operation.

The requisite increased bussing under the plan presents a clear danger to life and limb of the students exposed to

the crossbussing through the two most dangerous intersections of the City at peak traffic time and this was apparently obvious to the Court of Appeals in this case.

It is worthy of note that in the *Swann* case, the bus trips cover an average of seven miles as compared to 11.2 miles in the Newport News system and that the longest period of time required on bus in the *Swann* case was thirty-five minutes as compared to one hour in Newport News.

2. THE EXCESSIVE AMOUNT OF TIME ON BUSES AND THE INSURMOUNTABLE TRAFFIC PROBLEMS REQUIRE IMPLEMENTATION OF THE NEIGHBORHOOD PLAN FOR ALL ELEMENTARY STUDENTS.

The Court of Appeals recognized and acknowledged the unique factors and circumstances of the Newport News School System (*Frank V. Thompson, et al.* v. *The School Board of the City of Newport News, Virginia, et al.*, Nos. 71-2032 and 71-2033, Circuit Court Appeals for the Fourth Circuit, August 2, 1972, opinion attached, pp. 6-13).

The Court of Appeals, in the *Newport News* case, *supra,* calls specific attention to the expert testimony on traffic congestion in the district, especially as it related to traffic out of or into the Old City. It further acknowledged that the traffic pattern is obstructed by two major highway crossings through which traffic passing from the Old City to the other areas must pass. The Court points out the fact that the testimony is uncontradicted and shows the travel time to vary from a minimum of forty minutes and a maximum of one hour, each way, to bus the black students out of the Old City and the white students into the Old City in order to achieve a racial balancing of the district. (Ironically, the Court of Appeals actually calls the objec-

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tive, "... to achieve a racial balancing of the district.") The average distance of the bussing would be 11.2 miles, one way. It is obvious that these time and distance factors far exceed those approved in *Swann*.

> "*Swann* recognized that there were special difficulties in achieving desegregation in urban areas such as Newport News and that 'Rural areas accustomed for half a century to the consolidated school systems implemented by bus transportation could make adjustments more readily than metropolitan areas with dense and shifting population, numerous schools, congested and complex traffic patterns.' Changes in the metropolitan areas, sometimes unexpected and sudden, are not infrequently of such a character that they may be said to result in 'neutralizing or negating remedial action before it was fully implemented.' Chief Justice Berger speaking for the Court made the specific point that 'An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process. *** It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students.' In short, it seems fair from a careful reading of the opinions in both *Swann* and its companion *Davis* v. *Comm'rs. of Mobile County*, 402 U.S. 33 (1971) to conclude, as the Court remarked in *Northcross* v. *Board of Education of Memphis City Schools* (Sixth Cir. 1971) 444 F.2d 1179, 1183, that, as a result of the consideration just stated, those decisions are not to be read 'as requiring the District Court to order the Board to provide extensive transportation of pupils to schools all over the City, regardless of distances involved, in order to establish a fixed ratio in each school.' Courts may and should give consideration to the distances and ages of the students involved in determining how much bussing is proper."

(*Frank V. Thompson, et al.* v. *The School Board of the City of Newport News, et al., supra*)

It is interesting to note that in *Northcross* v. *Memphis Board of Education* (Sixth Circuit, August 29, 1972), 41 LW 2149, the Court stated that the provisions in *Swann* relating to the legal existence of all or predominantly, one-race schools was obviously designed to insure that tolerances are allowed for practical problems of desegregation where an otherwise effective plan for dismantlement of the dual system has been adopted. The Court in this most recent *Northcross* case states that the most serious practical problem is that of requiring children to spend an excessive amount of time on buses. In *Calhoun* v. *Cook* (D.C. Ga. 1971) 332 F. Supp. 804, the Court dealt with a city which had divided itself into a black and white city, with the white students concentrated at the extreme northern and southern ends, and the vast middle being a broad belt of industry and high-density solid black housing, creating a very congested traffic condition. The Court refused to require cross-bussing in all instances and said:

> "The time and distance which would be involved is impractical, particularly for children in the primary and elementary grades."

In *Ross* v. *Eckels* (Fifth Cir. 1970) 434 F.2d 1140, the Court approved a plan which desegregated all secondary schools relating its intent to be to provide an integrated atmosphere for all children at the secondary level. The Court, however, allowed neighborhood schools for the elementary grades, except in those situations where the pairing of contiguous schools was practical.

This is precisely the method utilized in the neighborhood plan proposed by the School Board of Newport News, which

was rejected by the District Court and the Court of Appeals.

The opinion of the Court of Appeals in the *Newport News* case (attached hereto), substantiates the position of the School Board that the neighborhood plan proposed by the School Board is legal and meets all constitutional requirements.

The cited cases combined with the unique circumstances and conditions in Newport News indicate that the proposed elementary plan was valid whether or not a Dual System of Schools exists. In short, the elementary plan required by the Lower Court is unwarranted and is contrary to the guidelines prescribed by this Court for such cases.

**C. The Emergency School Aid Act [4] Shows Plainly That This Court's Interpretation in Swann Of Section 2000 C(B) And 2000 C-6 Of Title IV Of The Civil Rights Act Of 1964 Does Not Reflect The Intent Of Congress But On The Contrary The Congress Did In Fact Intend To Restrict The Equitable Powers Of The Federal Judiciary.**

This Court undertook in the case of *Swann, et al.* v. *Charlotte-Mecklenburg Board of Education, supra,* to interpret Title IV of the Civil Rights Act of 1964, 42 U.S.C. Section 2000 C, and to state in said decision what the congressional intent was with reference thereto. The Emergency School Aid Act, *supra,* forecloses any question that this Court properly construed its intent or the Civil Rights Act of 1964. The Court's interpretation of the Civil Rights Act of 1964, in *Swann,* was in response to an argument by the school authorities that the equity powers of the Federal District Courts were limited thereby.

In *Swann,* this Court said that it (Title IV of the Civil Rights Act of 1964) was not enacted to limit but to define the role of the Federal Government in the implementation

[4] *Supra.*

of the *Brown I, supra,* decision. This Court, of course, is a part of the Federal Government.

Section 2000 C (B) defines "desegregation" as it is used in Title IV of the Civil Rights Act of 1964, as follow:

> "'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

Section 2000 C-6 of Title IV of the Civil Rights Act of 1964 contains the following proviso:

> "Nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards."

This Court, with reference to the Congressional intent and the interpretation of the two quoted sections, held that said sections purport only to insure that the Act would not be read as granting new powers. This Court gave as its reason that the legislative history of Title IV indicated that Congress was concerned that the Act might be read as creating a right of action under the Fourteenth Amendment in the situation of so-called "defacto segregation," where racial imbalance exists in the schools but with no showing that this was brought about by discriminatory action of state authorities.

The Emergency School Aid Act, *supra,* in Title VIII—General Provisions Relating To The Assignment Or Trans-

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portation Of Students, Sections 805 and 806, provides as follows:

> "Sec. 805. The rules of evidence required to prove that State or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States."
>
> "Sec. 806. The proviso of Section 407 (A) of the Civil Rights Act of 1964 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by Title IV under all circumstances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States regardless of whether the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the Northern, Eastern, Western or Southern part of the United States."

The Act clearly sets forth the intent of Congress and squarely tells this Court that it shall not distinguish between "de jure" and "de facto" segregation.

Further, the Act presents to this Court the proposition that this Court misinterpreted the Civil Rights Act of 1964 in the *Swann* decision.

The Act has a strong impact upon the situation in this, and similar cases which arise in Southern states. Where the courts make a determination of the existence of dual system of schools based upon the existence of a state statute

separating the races in said schools, they have acted erroneously and Congress has said this is so.

The Court must then find a purposeful separation of the races in the schools by governmental authority. This subject has been discussed exhaustively herein and the facts, circumstances and evidence in this case will support no such finding.

**D. The School Board Was Entitled To A Full Evidentiary Hearing And Determination Upon Such Evidence Of The Constitutionality Of The Freedom-Of-Choice Plan.**

In *Bradley* v. *School Board of Richmond* and *Gilliam* v. *School Board of Hopewell,* 382 U.S. 103, (1965) the Supreme Court held that it was improper for a Court to approve a school desegregation plan without considering at full evidentiary hearings the impact on the plan of faculty allocation on alleged racial basis.

The *Swann* case is replete with suggestions and "guidelines" that the equitable discretion of the District Court Judge is wide and that unusual circumstances with which the District Court Judge, being close to the locality, is familiar are matters to be considered by the Court in making its determination of the validity of a particular school plan. *Swann* alluded to the "critical travel time," "traffic patterns" and "good highways." The Court said:

> "conditions in different localities will vary so widely that no rigid rules can be laid down to govern all situations."

Despite the suggestion to the District Court Judge that he examine the local conditions in making such determination, he appeared to be throwing up his hands and enforcing, without full evidentiary hearing a broad rule that any

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bizarre method could be employed. The District Court summarily rejected the freedom-of-choice plan, without the benefit of the requisite evidence to do so.

The error is even more telling, in light of the expert evidence of George J. McIntosh, that the separation of the races in the City of Newport News is not the result of a law separating the races in the schools.

Although the Plaintiffs interpret the decisions of the Federal Courts to merely require a showing of black-white percentages in particular schools, there is no question that the percentage mix is only one of many factors to be considered in determining the validity of a school plan.

The School Board was entitled to be heard.

## CONCLUSION

The foregoing unique factors and circumstances constitute sufficient reason for the granting of the writ.

The importance of the issues raised in this proceeding to the Newport News School System are obvious. The circumstances and predicaments of each school system with respect to desegregation are to some degree peculiar to it. Although the uniqueness of the situation and circumstances in the Newport News System is apparent, many of the factors are not uncommon, either singly or in combination, in many other urban school districts. The issues cover the spectrum of important and unsolvable problems requiring decisions by the lower courts, governmental agencies, educators, local governments and minority groups.

The issues raised herein give to this Honorable Court the opportunity to amplify the requirements and the exceptions of *Swann* in such unique situations.

For the foregoing reasons, it is respectfully submitted that the Petition For A Writ Of Certiorari should be granted

to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

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No. 71-2032

---

FRANK V. THOMPSON, ET AL.,

*Appellants,*

VERSUS

THE SCHOOL BOARD OF THE CITY OF NEWPORT NEWS, VIRGINIA, ET AL.,

*Appellees.*

---

No. 71-2033

---

FRANK V. THOMPSON, ET AL.,

*Appellees,*

VERSUS

THE SCHOOL BOARD OF THE CITY OF NEWPORT NEWS, VIRGINIA, ET AL.,

*Appellants.*

---

Appeals from the United States District Court for the Eastern District of Virginia, at Newport News. Walter E. Hoffman, District Judge.

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Argued June 7, 1972. Decided August 2, 1972.

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Before HAYNSWORTH, Chief Judge, WINTER, CRAVEN, BUTZNER, RUSSELL and FIELD, Circuit Judges, sitting en banc.

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Henry L. Marsh, III (S. W. Tucker, James W. Benton, Jr., and Hill, Tucker and Marsh; and Philip S. Walker, Jack Greenberg, James M. Nabrit, III, and Norman Chachkin, on brief) for appellants in No. 71-2032, and for appellees in No. 71-2033; Robert V. Beale (Bateman, West and Beale, and Panos A. Yeapanis, City Attorney for the City of Newport News, Virginia, on brief), for appellees in No. 71-2032, and for appellants in No. 71-2033.

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Russell, Circuit Judge:

From an order of the District Court in these school desegregation cases, both plaintiffs and defendants have appealed.

The appeal of the plaintiffs will be first considered.

I.

Plaintiffs assail the manner in which the plan approved by the District Court would assign elementary pupils in the school system. Under the plan, pupils in grades 1 and 2 are to attend neighborhood elementary schools; pupils in grades 3, 4 and 5, as well as pupils in grades 6 and 7 are to be assigned to paired schools. For the first paired group (i.e., pupils in grades 3, 4 and 5), the mother schools to which all living in the paired neighborhoods are assigned, are schools formerly identifiable as white in a white neighborhood and, in turn, all pupils in grades 6 and 7 would be assigned to formerly identifiable black schools. The plaintiffs took exception in the District Court and on oral argument in this Court to both the assignments of grades 1 and 2 to neighborhood schools and grades 3, 4 and 5 to formerly identifiable white schools. In their statements of issues on appeal, as set forth in their written brief filed with this Court, how-

ever, the plaintiffs did not object to the assignments of grades 3, 4 and 5 and confined the issues, as set forth in their brief, to the assignments of grades 1 and 2 to neighborhood schools. Since there was some reference to the issue relating to the assignments of 3, 4 and 5 grades in oral argument it would seem appropriate to touch briefly on this issue before passing on to the primary issue in the case.

It should be observed at the outset that, as a result of the pairings of grades 3 through 7, the proportion of black students in these grades in the various schools, while varying from approximately 15 to 50 per cent, will approximate, it is estimated, 65 per cent white and 35 per cent black in most instances. To achieve this result will require extensive busing. It was argued before us that the assignments made to paired schools for the 3rd, 4th and 5th grades, and the substantial amount of busing that followed from such assignments placed an undue and discriminatory burden on black students. The basis of this argument is that the white school child would attend for his first five school years a school formerly identified as a white school and located in a white neighborhood, whereas the black child would be in a school located in a black neighborhood only in his first two grades and in his 6th and 7th grades.

The situation in the respective pairings in this case is not appreciably different, however, from that involved in *Clark* v. *Board of Education of Little Rock School Dist.* (8th Cir. 1971) 449 F.2d 493, where the pairings under the plan of desegregation required all 8th and 9th grade pupils to attend school in four junior high school centers, three of which had been previously identifiably black schools and all 6th and 7th grade pupils were required to attend schools in facilities previously identifiably white. In sustaining the plan, the Court said (p. 496):

> "While we agree that the burden of integration must be shared by blacks and whites, we do not agree that the sharing of the burden at the secondary level, when considered as a whole, is so unequal as to require upsetting the District Court's plan."

To the same effect is our own case of *Allen* v. *Asheville City Board of Education* (4th Cir. 1970) 434 F.2d 902, where it was stated, in sustaining a plan against a similar claim of unfair burden (p. 907):

> "If achieving integration by free bus transportation for reasonable distances must now be characterized as a 'burden' and if we also assume, without deciding, that this burden must be equally shared between the races, the school board's plan is nevertheless valid. The worst that can be said of the plan is that in grades 1 through 5 the burden falls disproportionately on black children, whereas in grades 6 through 12 it falls disproportionately upon white children."

See, also, *Hart* v. *County School Board of Arlington Co., Virginia,* (D.C. Va. 1971) 329 F. Supp. 953, aff. ..... F.2d ....., where a like claim that, as a result of the assignment of elementary pupils among schools under the proposed plan "all the burdens and inconveniences of desegregation are imposed entirely on the black children," was disallowed.[1] (p. 955)

It must be conceded that, unlike the situation in *Clark* and *Allen,* there is here an unequal division between the school years spent by elementary students in identifiably black and identifiably white schools. Such inequality, how-

[1] Chief Justice Burger refused to stay implementation of this plan as approved by the District Court. *The New York Times,* September 5, 1971, at p. 20, col. 1.

ever, is unavoidable, since there is an unequal number of elementary grades (i.e., seven). Of the two groupings, one had of necessity to include three grades and the other two grades. There was some obligation on the school board to offer satisfactory reasons for the grouping it made, since the white elementary students had one more year in elementary identifiably white schools, than black elementary students had in identifiably black schools. Since the cause is to be remanded, the District Court should inquire into and make findings of fact on whether the grade groupings were based on non-discriminatory grounds. See *Haney* v. *County Board of Education of Sevier County* (8th Cir. 1970) 429 F.2d 364, 372.[18]

The most difficult issue posed by the plaintiffs relates to the assignment of pupils in grades 1 and 2. The District Court gave as its primary reason for approving neighborhood schools for the 1st and 2nd grades

> "* * * that the bussing facilities, assuming the adoption of the elementary plan as submitted on August 6, 1971, will be taxed to the limit. If we are to likewise move the first and second grades, that would require additional bussing facilities or a staggering of the opening of the schools, which is most undesirable but which has been ordered in other areas, especially where the school does not own and operate its bus system; but, lastly, the reason that I think it is important to keep children in the first and second grades in the neighborhood area is that while it is not supported by any testimony in this case, I am old-fashioned enough to think

[18] In determining the fairness of the grouping adopted under these circumstances where some inconvenience is inevitable, the school district was not required to disregard comparative expenses involved in the various available groupings, as well as the comparative numbers required for cross-busing under the feasible methods of groupings.

> that it is vitally important that a child, starting his or her public education, should commence the same with some degree of happiness and satisfaction, including some degree of comfort on the part of the parent who, indirectly or directly, controls that child, and children of that age are of sufficient intelligence to hear the griping of the father and mother about the transportation of that child for the first couple of years. They will hear it again later, but the child may have matured somewhat. If you send a child to public school with a chip on the child's shoulder, in my judgment, it would adversely affect the child."

It is, of course, axiomatic that every plan must take into consideration the unique characteristics of the school district to be served. What may be practical in one district may not be applicable in another. This was made plain in the opinion of the Court in *Green* v. *County School Board* (1968) 391 U.S. 430, 439:

> "There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance."[2]

Manifestly, Newport News School District presents unique problems for the development of a practical plan of desegregation. These problems arise out of its physical pattern

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[2] See, also: *Swann* v. *Board of Education* (1971) 402 U.S. 1, at p. 29:

> "Conditions in different localities will vary so widely that no rigid rules can be laid down to govern all situations."

*Ross* v. *Eckels* (5th Cir. 1970) 434 F.2d 1140, 1147:

> "* * * school cases are unique. Each school case must turn on its own facts."

as well as out of the geographic concentration of its racial groups. The Newport News School District is a consolidation of the old City of Newport News with the former City of Warwick (Warwick County prior to 1952), made effective in 1958. The old City of Newport News is located at the extreme southerly tip of the Virginia Peninsula. It comprises a small, concentrated area of four square miles. The City of Warwick, on the other hand, is to the northeast of the City of Newport News and contains more than sixty square miles. The consolidation created an odd-looking district, described in the record as "cigar-shaped," somewhat more than twenty-two miles in length and varying in width from seven-tenths of a mile to six miles. Not only was it unique in its geographic limits; its racial distribution was so distributed as to create to a degree two separate racial communities. Eighty per cent of the black population lives in the old City of Newport News. This concentration has developed over the years. In 1930, for instance, the population of the old City of Newport News was approximately sixty per cent white and forty per cent black. Thirty years later the proportions were exactly reversed. By 1970 the black proportions had risen to over ninety per cent. Outside of the old City of Newport News and its immediate environs, there is no substantial grouping of blacks except for a small, narrow strip running across the northwest width of the district near its center. The elementary school population of the district as a whole is roughly thirty-six per cent black and to service this population, the district maintains thirty-two elementary schools, thirteen of which are located in the old City.

The school district offered expert testimony on traffic congestion in the district, especially as it related to traffic out of or into the old City. This traffic pattern is obstructed by

two major highway crossings, through which traffic passing from the old City to other areas of the district must pass. These crossings or interchanges, it was testified, are particularly crowded during the hours when there is school busing by working people going or returning from work at the Newport News Shipbuilding and Dry Dock Company, where some twenty thousand people are daily employed. It was the contention of the school board that, as a result of the heavy volume of traffic at these intersections, there was an abnormally high accident incidence. As a consequence of this traffic arrangement, it was argued that buses could not follow a straight line but were forced to follow a more circuitous route from the old City to other points in the district.[3] It was testified, without contradiction, that travel time, varying from a minimum of forty minutes and a maximum of one hour, each way, would be required for busing black students out of the old City and white students into the old City in order to achieve a racial balancing of the district. The average distance of the busing would be 11.2 miles, one way. The difficulties of achieving racial balance in this district as a result of distances involved and traffic problems were explained by the School Superintendent thus:

> "Now, with all of the concentration in Newport News being at one end, in order for a cross-busing plan to produce results in this case it is necessary to involve all

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[3] *Swann* makes it plain that the point to consider in connection with busing is not so much geographic contiguity as "the critical travel time" itself, as caused by the "traffic patterns" in the District. (402 U. S. p. 29).

It has several times been stated that in this connection distance shall be measured not by straight-line distances (or, as one court describes, "as the crow flies") but along practical and available routes of transportation. *Hightower* v. *West* (5th Cir. 1970) 430 F. 2d 552, 555; *Lee* v. *City of Troy Board of Education* (5th Cir. 1970) 432 F. 2d 819, 822, n. 10.

or nearly all, of the other elementary schools, and therefore it becomes a matter of busing from the extreme south east end of the city through the entire length of the city and vice versa. There are no areas scattered throughout the city of any consequence to provide this necessary mix. It must all come from one area."

*Swann*[4] recognized that there were special difficulties in achieving desegregation in urban areas such as Newport News and that "Rural areas accustomed for half a century to the consolidated school systems implemented by bus transportation could make adjustments more readily than metropolitan areas with dense and shifting population, numerous schools, congested and complex traffic patterns."[5] Changes in the metropolitan areas, sometimes unexpected and sudden, are not infrequently of such a character that they may be said to result in "neutralizing or negating remedial action before it was fully implemented."[6] Chief Justice Burger, speaking for the Court, made the specific point that, "An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children[7] or significantly impinge on the educational process. *** It hardly needs stating that the limits on time of travel will vary with many factors, but

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[4] 402 U. S. 1.

[5] 402 U. S. at p. 14.

[6] 402 U. S. at p. 14.

[7] The school district offered medical evidence that the extensive busing required if there were to be full integration of elementary grades in the school system would have an adverse effect on the health of the pupils. The District Court, in its opinion, stated it could not accept this "testimony in its entirety." We have accordingly not taken into account such testimony on this appeal. If there is any credible evidence along this line developed on remand, the District Court may give such consideration to it as it finds is warranted.

probably with none more than the age of the students."[8] In short, it seems fair from a careful reading of the opinions in both *Swann* and its companion *Davis*[9] to conclude, as the Court remarked in *Northcross* v. *Board of Education of Memphis City Sch.* (6th Cir. 1971) 444 F.2d 1179, 1183, that, as a result of the consideration just stated, those decisions are not to be read "as requiring the District Court to order the Board to provide extensive transportation of pupils to schools all over the city, regardless of distances involved, in order to establish a fixed ratio in each school." Courts may and should give consideration to the distances and ages of the students involved in determining how much busing is proper. This represents the obvious distinction between *Henry* v. *Clarksdale Municipal Separate School District* (5th Cir. 1970) 433 F.2d 387, 390-1, and *Ellis* v. *Board of Public Instruction of Orange Co., Fla.* (5th Cir. 1970) 423 F.2d 203, 205. In the first case, the school district comprised a mere four square miles and transportation presented no problems of distance. On the other hand, in *Ellis,* the school district consisted of a large land area, divided into ninety-eight schools. In *Henry,* the Court ordered full integration; in *Ellis,* it approved a partial neighborhood plan under which there remained identifiable black schools. Moreover, the District Court may also take into consideration any traffic hazards or other complexities of transportation in approving a plan of desegregation. Thus, in *Davis,* the Court was confronted with a situation somewhat similar to that here. The district was divided by a north-south primary highway into two areas, interchange between which was difficult. As a consequence, the plan under review treated the two areas, thus divided, separately

[8] 402 U. S. at pp. 30-1.

[9] *Davis* v. *School Comm'rs. of Mobile County* (1971) 402 U.S. 33.

and did not, because of the traffic hazards, require cross-busing between the two. As a result, there was a substantial number of identifiable black schools. The Supreme Court sent the plan back to the District Court with instruction that "the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, *taking into account the practicalities of the situation.*" (Italics added).[10] It seems implicit from this mandate that "practicalities" do represent a factor to be weighed by the District Court in passing on a plan of desegregation; and that cross-busing is not to be automatically ordered, irrespective of all considerations of distance, time required for travel, traffic hazards, and age and maturity of students involved.

This construction of the sweep of *Swann* and *Davis* has been applied in a number of recent cases quite similar to this case. In *Hightower* v. *West, supra,* a plan desegregating certain schools of Fulton County (Georgia) was considered. By the terms of the plan, the secondary schools of the system were fully desegregated, so that the Court could declare that "Every black student at some point in his school career will be exposed to complete desegregation: no high school is less than seventy percent white."[11] But, taking into consideration age and difficulties of transportation, the Court approved the zoning of the elementary grades in the schools involved, stating that "'each child (in the elementary grades) should attend the school nearest his home, rather than traveling past it to another school, unless compelling circumstances require otherwise.'"[12] Because of this treatment of the elementary grades, "two all-black ***, three

[10] 402 U. S. at p. 37.
[11] 430 F. 2d at p. 555.
[12] 430 F. 2d at p. 555.

majority-black, and several all-white schools would remain" in the system.[13]

*Calhoun* v. *Cook* (D.C. Ga. 1971) 332 F. Supp. 804, like *Hightower,* dealt with schools in the Atlanta area. At the time of the suit, Atlanta had roughly divided itself into a black and white city, with the white students being concentrated at the extreme northern and southern ends, and the vast middle being a broad belt of industry and high-density solid black housing, creating a very congested traffic condition. Even as in Newport News, residential patterns would require extensive cross-busing in order to achieve a balanced unitary school system. In concluding against such cross-busing in all instances, the Court said that, "The time and distance which would be involved is impractical, particularly for children in the primary and elementary grades."[14]

*Ross* v. *Eckels, supra,* arose in connection with the desegregation of the schools of Houston, Texas. Under the approved plan, all secondary grades were desegregated, with the result that, "Every Negro child at the high school and junior high school level will receive his education in an integrated atmosphere."[15] But, giving consideration to all factors, the plan accepted by the Court allowed neighborhood schools for the elementary grades, except where it was found that the pairing of contiguous schools was practical.[16]

While it seems clear from this review of the authorities that, under proper circumstances, the assignment of the primary grades to neighborhood schools is not *per se* unacceptable, such assignment must rest on specific findings of fact establishing that, on account of ages of the pupils

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[13] 430 F. 2d at p. 556.

[14] 332 F. Supp. at p. 808.

[15] 434 F. 2d at p. 1147, n. 9.

[16] 434 F. 2d at pp. 1147-8.

and difficulties of transportation, no other plan affording greater integration is practical. And, where there is insufficient basis for such conclusion, zoning is impermissible. That represented the rationale of the decision in *Edwards* v. *Greenville Municipal Separate School Dist.* (5th Cir. 1970) 431 F.2d 365, where the District Court had approved a plan providing for geographic attendance zones for the elementary grades (i.e., 1 through 6 grades). Incidentally, such plan had the overwhelming indorsement of the school system's biracial committee. The Circuit Court remanded the cause with direction to the District Court to consider whether, in some instances at least, pairing of schools in order to achieve a better racial balance was not feasible and remand is particularly apposite where the District Court has failed to consider any alternate plans. In this case, the plaintiffs sought to develop proof of an alternate plan which they claimed would achieve a greater degree of integration at the elementary level than that approved by the Court. The District Court, however, refused to consider this proposal of the plaintiffs. Perhaps, as the District Court commented, the proposal was no more than a jumbling of figures. But at least reasonable opportunity should have been given the plaintiffs to present in the evidence their alternative. It was to provide just such an opportunity that *Calhoun* v. *Cook, supra,* on appeal, was remanded and the District Court was "ordered to afford plaintiffs-appellants a reasonable opportunity to present and support an alternate and superior plan for the desegregation of the Atlanta school system, which plaintiffs indicated could be and was being developed." *Calhoun* v. *Cook* (5th Cir. 1971) 451 F.2d 583. This result, too, is consonant with our own decision in *Adams* v. *School District Number 5, Orangeburg Co., S. C.* (4th Cir. 1971) 444 F.2d 99, 101, to the effect:

> "If the district court approves a plan achieving less actual desegregation than would be achieved under an alternate proposed plan it shall find facts that are thought to make impracticable the achieving of a greater degree of integration, especially if there remain any schools all or predominately of one race."

To summarize: While not concluding that the use of neighborhood assignments for grades 1 and 2 in this particular school district with its unique characteristics is *per se* invalid, the action is remanded to the District Court to consider fully any alternate plans that may be presented by the plaintiffs and others and to determine whether, on the basis of specific findings of fact, there is any practical or feasible alternative, promising greater racial balances in these two grades, to the neighborhood plan proposed by the school district, and, if there is, to amend the plan of desegregation accordingly.

II.

The plaintiffs, also, appeal on the ground that the allowance of attorney's fees made to their counsel by the District Court was inadequate. The defendant school district, on the other hand, contends the District Court erred in making any allowance of attorney's fees. It would seem inappropriate, however, to consider this claim until the District Court has resolved the issues, which on remand, it is hereby mandated to consider. In connection with its final order on those issues, it may make such allowances of attorney's fees as it finds proper under the terms of Section 718, Higher Education Act of 1972.

III.

The defendant school district has appealed, contending that the District Court erred in imposing its plan of de-

segregation upon the school district. We have already indicated provisions of the plan which in our judgment, require further consideration by the District Court; except in these particulars, the plan of desegregation adopted by the Court was fair and the objections of the school district are without merit.

Remanded With Directions.

**OPINION FROM THE BENCH**

**August 12, 1971**

[3] (After argument of counsel, the following opinion was rendered by the Court:)

The Court: If all comments have been finished, let's go.

Gentlemen, my comments made at the time of the hearing on August 4, 1971, should, of course, be incorporated into my ruling today by reference.

No school plan submitted under Swann or any other decision can reach perfection.

As to the senior high school plan, I have no intention to substitute my judgment for that of the School Board as to whether the Newport News High School, which apparently is to be converted into a junior high school, should be retained as a senior high school. That appeared to me, as I indicated on August 4, 1971, as the only serious question which was worthy of consideration.

I therefore will approve the senior high school plan as submitted by the School Board.

With respect to the junior high school plan, it is my understanding that there was no basic objection to the allocation of students. While the same objection would adhere to the junior high school location of schools as would lodge

with the senior high schools, namely, that the junior high schools are all located in the west and northern end of the city, yet, again, I should not substitute my [4] judgment for those who should be more knowledgeable in where a particular school is located. My only expressed apprehension with respect to the selection of a certain school as a senior high school or a certain school as a junior high school was the effect upon continuing segregation in the particular area selected.

I think that Mr. Greenwood's testimony, while no one can tell whether he will be correct or not, is nevertheless acceptable, and he certainly is more qualified to voice an opinion than I am.

As to the elementary plan which was originally filed on June 14, 1971, I have previously rejected that on August 4, 1971, as not in compliance with Swann. I reaffirm that rejection.

That brings us to the elementary plan which was filed on August 6, 1971.

Once again, nothing in this complex field will be satisfactory to either the NAACP, the School Board or the citizens, and I do not say that it is satisfactory to me, but the schools must proceed if they are to be operated at all.

In the case of City of Montgomery or Montgomery School Board against the United States, I think it was Mr. Justice Black who commented that in the field of desegregation, innovations in connection with these matters [5] should be at least advanced and considered.

On this record, we have the undisputed testimony of Dr. Hogge, a thoroughly qualified pediatrician, to the effect that children will be adversely affected by the approximate one hour and a half additional bus riding to and from various schools and, as Dr. Hogge indicated, this would

carry on through those in the entire elementary system, but he was very candid to indicate that the effect upon any child, as the child grew older, would be definitely lessened.

I am not unmindful of the fact that children go and are bussed to private schools, to kindergartens, at a lesser age than ones entering the first grade. Perhaps it is that the mothers are so anxious to get a few hours off that they would like to put the child in those schools. Perhaps it is to give the child some advance education before the first grade. Perhaps the bussing of the children in the earlier grades is preparatory to putting them into a public education system, but going to a private school may be due to the fact that parents resent what now is going on in the public school system throughout not only Newport News but substantially all over the south.

While I cannot accept Dr. Hogge's testimony in its entirety as to the adverse effect on the health and mental processes of a child by reason of an additional bus trip which will extend the child's day for approximately an hour and a [6] half on an average, counting bussing to the school and then back to the child's home neighborhood, I am in complete agreement and so find that every effort should be made to keep children in the first and second grade category in the neighborhood school.

This is occasioned by not only the health and mental processes of the child but also by reason of the fact that to move the child a considerable distance from the school removes the parental participation that is so necessary in getting a child started in school. It eliminates any after-school activities by reason of the extended period of the child attending school.

The bussing facilities at Newport News are at the expense of the taxpayers. There will, of course, be an addi-

tional expense to the taxpayers occasioned by the increased bussing which is necessary in the upper grades, but, of course, the bussing is free in the sense that no particular charge is made for any trip.

The testimony is uncontradicted that the bussing facilities, assuming the adoption of the elementary plan as submitted on August 6, 1971, will be taxed to the limit. If we are to likewise move the first and second grades, that would require additional bussing facilities or a staggering of the opening of the schools, which is most undesirable but which has been ordered in other areas, especially where the [7] school does not own and operate its bus system; but, lastly, the reason that I think it is important to keep children in the first and second grades in the neighborhood area is that while it is not supported by any testimony in this case, I am old-fashioned enough to think that it is vitally important that a child, starting his or her public education, should commence the same with some degree of happiness and satisfaction, including some degree of comfort on the part of the parent who, indirectly or directly, controls that child, and children of that age are of sufficient intelligence to hear the griping of the father and mother about the transportation of that child for the first couple of years. They will hear it again later, but the child may have matured somewhat. If you send a child to public school with a chip on the child's shoulder, in my judgment, it would adversely affect the child.

I say very frankly, gentlemen, that I am thoroughly aware of the fact that there are many, many black citizens in this and other communities who do not want this cross-bussing that must even be approved in this particular case. They feel like many white parents feel that it will have an adverse effect on the child. That is true in Newport News,

even though it will cost nothing in the sense of actual dollars for bus transportation. In other areas, it will cost in the neighborhood of approximately $200 a year [8] for some parents to pay for the bus transportation to get their child to and from the schools.

I, of course, have no suggestions as to what the appellate court will do with my adoption of the neighborhood school plan as submitted for grades 1 and 2. My record is rather poor, and I assume that they will make short shrift of what I do in any event, but it is an innovation.

It was not discussed in Swann, except to the extent that the Chief Justice does indicate that the age of the child may be considered.

Considering the age of that child, I feel that the approval of the neighborhood school, combined with freedom of choice, is constitutional when we also consider that the school, as a whole, will become a racially unidentifiable school in the opinion of this Court.

It is quite true that if we confine the definition of a racially unidentifiable school only to grades 1 and 2, then the plaintiffs are absolutely correct that there are racially identifiable schools in grades 1 and 2, but when those schools or those grades are combined with the other grades, we have a very representative percentage of black and white in each particular elementary school.

There is a difference of opinion between counsel and the Court as to what constitutes a racially unidentifiable [9] school or a racially identifiable school, as the case may be, and that difference will never be resolved until some appellate court states that it has to be at a fixed percentage, and apparently that is not going to be done. I have urged it. I have previously indicated, in my judgment, a 10 percent figure, which was at one time estimated or stated to

be a racially unidentifiable school figure by an expert employed by the NAACP in some case. I have accepted that. I realize that you cannot have completely token desegregation and meet any constitutional test under Swann or under any prior decision.

I will continue to adhere to the 10 percent rule, not as a fixed figure as such but as a figure that can be considered in looking at the individual school as contrasted with the entire school system.

It is highly important that, wherever possible, the openings and closings of each particular school should be as uniform as possible. I doubt seriously—and Mr. Greenwood indicated that there is nothing definite yet as to the handling of the elementary schools with respect to their openings, and I frankly suspect that when a more careful study of the problem is made, there will have to be some staggered opening of the elementary schools.

However, be that as it may, the plan has its commendable features in holding the elementary schools and [10] the intermediate and senior high schools to a more or less fixed opening date, and this plan of opening and closing schools will successfully operate under the present bus system, but if we are to add a large number of children, as we would have to add if we abolish the neighborhood school plan for grades 1 and 2, we would have a definitely extensive opening and closing that would probably result in elementary schools opening as late as perhaps 10:30 in the morning.

I have already discussed with counsel—and they are now in agreement—as to the revision for the majority-minority transfer rule, and I think that is clear from the record, so I will not give it any further consideration.

I have already indicated that the School Board should report to the Court, with a copy to counsel for the plaintiffs,

as to the carrying out of this plan, and while I have no fixed ideas about the subject, Norfolk reports on or about October 1, Portsmouth elected to report on or about November 1. All I would like to say is that I expect a report to be filed with the Court, with a copy to counsel, as to the operation of the plan, the school children in each particular school, and so on.

I have indicated to counsel that the plan which mentions that consideration will be given to children recommended for placement for medical or psychological reasons [11] must be thoroughly supported by documentary evidence and that the work of any committee appointed by the Superintendent, including the school physician and the chief psychologist, will be scrutinized with care.

I am mindful of the fact that medical or psychological reasons may be perfectly valid for the reassignment of children from the particular area to which they should be assigned otherwise, but I am always somewhat leery about committees, and the School Board and the Superintendent will be responsible for the action of that committee.

As to the faculty, I previously indicated on August 4, 1971, that I approved of the procedure adopted by the School Board, in which each school is guaranteed to have a minimum of 50 percent white teachers, each school is guaranteed to have a minimum of 20 percent black teachers, and that the remaining 30 percent will consist of black or white teachers, as the Superintendent of Schools, or his subordinate, may determine.

I see nothing wrong with that.

The ratio of white to black is approximately 64 percent white, 36 percent black. The faculty allocation, under this suggested plan, gives some leeway to the School Board and at the same time will approach somewhere near the ratio of

64 percent white and 36 percent black in each [12] particular school.

Gentlemen, do you have any other specific requests for findings that I may have overlooked, because this is the Court's opinion?

Wait a minute.

I do believe, gentlemen, that this is a proper case for the allowance of limited counsel fees. I say "limited" because I am limiting it to the necessity of counsel for plaintiffs coming back today. I do not believe that it is a matter that should receive counsel fees that may be commensurate with the work done. From the discussions of June 16, 1971, it occurs to me that the School Board should have been prepared to have submitted at least an alternative plan. I suggest that a fee of $750 would be appropriate to be paid by the defendants to counsel for the plaintiffs, one fee, not—we had four lawyers the other day. Now we only have three, unless that other gentleman sitting there in the red shirt is a lawyer, but one fee.

It is the first time that I have allowed an attorney's fee in any school board case. I am thoroughly mindful of the fact that you do have a peculiar problem in Newport News.

You look at the map and the city is somewhat like an elongated hotdog, with most of the blacks in one end and most of the whites in the north end, and I know that [13] Mr. Beale feels that Swann would permit that condition to exist. I reluctantly disagree with him. I do not say that it is for the betterment of the children as a whole. I do say that the plan, as now approved, will provide, in my opinion, a unitary school system, and I so declare that if this plan is carried out, it will constitute a unitary school system.

The Court of Appeals may disagree with me with respect to at least the first and second grades, and if they do, I am certain that they will reverse my finding in this regard.

* * *

**ORDER**

**Entered August 23, 1971**

For reasons stated orally by the Court, with reference to the Secondary School Organization plan (plan 1—Freedom of Choice), on June 16, 1971 and for reasons stated by the Court at the conclusion of the trial of the above captioned case on August 12, 1971, it is Adjudged, Ordered and Decreed as follows:

(1) The Secondary School Organization plan (plan 1—Freedom of Choice), filed herein on June 14, 1971 is hereby rejected and disapproved.

(2) The Secondary School Organization plan (plan 2) filed herein on June 14, 1971 is hereby approved.

(3) The Elementary Neighborhood School, Zone-Pairing Plan, filed herein on June 14, 1971 is hereby rejected and disapproved.

(4) The Elementary Zone-Pairing Plan filed herein, pursuant to order of and under compulsion of this Court, on August 6, 1971 is hereby approved.

(5) The Faculty Assignment Plan filed herein on June 14, 1971 is hereby approved.

(6) Except as otherwise shown by the record and as provided herein the oral and written exceptions of the Plaintiffs and Defendants to all plans considered by the Court, are hereby overruled.

(7) The administrative provisions of the Elementary Zone-Pairing Plan, as amended by this Court with the consent of Defendants, in open Court, are hereby approved and the provisions thereof relating to placement for medical

or psychological reasons must be supported by documentation.

(8) The Defendant, School Board, shall file with the Court on or before November 1, 1971, of the 1971-72 school year a report stating the actual numbers of black and white students enrolled in each school and the numbers of black and white faculty members assigned to each school, together with their respective titles. The Court reserves the right to call upon the School Board for a report during the Spring of 1972.

(9) The Court being of the opinion that Defendants have diligently sought to solve the desegregation problems existing in the school district, except however the elementary plan submitted on August 6, 1971 should have been submitted instead of or as an alternative to the elementary neighborhood plan submitted on June 14, 1971, counsel for Plaintiffs are awarded reasonable counsel fees in the amount of Seven Hunderd Fifty ($750.00) and 00/100 Dollars for services incident to this proceeding.

Let the Clerk send copies of this Order to all Counsel of Record.

Entered this 23rd day of August, 1971.

United States District Judge

## PLAN FOR OPERATION OF NEWPORT NEWS SCHOOL SYSTEM

**Filed June 16, 1971**

*Plan I: Freedom of Choice High School—Neighborhood Elementary School*

1. The Newport News school system has been organized under freedom of choice since 1965. It is proposed that this organization be continued in the high schools with one exception: that in case of overcrowding resulting from the original choice period, those pupils in the racial majority will be required to make a second choice according to distance from school.

2. The elementary school plan labeled "Zones for Elementary Schools" which divides the city on the neighborhood concept, pairing certain schools, rearranging grade levels in some schools and drawing lines in such a way as to provide for increased desegregation. Map and description labeled No. 1.

*Plan II: Noncontiguous High School—Neighborhood Elementary School*

1. The high school plan that divides the city into areas numbered 1, 2, 3, 4, 5, 6, 7 in which pupils living in areas 2 and 4 will be assigned to Huntington Intermediate for grades 8 and 9 and Warwick High for grades 10, 11 and 12; pupils living in areas 3 and 5 will be assigned to Newport News Intermediate for grades 8 and 9 and Ferguson High for grades 10, 11 and 12; pupils living in areas 1 and 6 will be assigned to Carver Intermediate for grades 8 and 9 and Menchville High for grades 10, 11 and 12. All pupils in area 7 will be assigned to Denbigh High for grades 8, 9, 10, 11 and 12. Map and description labeled No. 2.

2. The elementary school plan labeled "Zones for Elementary Schools" which divides the city on the neighborhood concept, pairing certain schools, rearranging grade levels in some schools and drawing lines in such a way as to provide for increased desegregation. Map and description labeled No. 1.

* * *

Enrollment by Race—October 1970

| | *W* | *NW* | *Total* |
|---|---|---|---|
| Briarfield | 676 | 174 | 850 |
| Carver Elementary | 3 | 504 | 507 |
| Charles | 332 | 17 | 349 |
| Clark | 0 | 91 | 91 |
| Deer Park | 725 | 13 | 738 |
| Denbigh Elementary | 84 | 133 | 217 |
| Dunbar | 1 | 1010 | 1011 |
| Epes | 514 | 154 | 668 |
| Erwin | 0 | 381 | 381 |
| Hidenwood | 680 | 25 | 705 |
| Hilton | 440 | 18 | 458 |
| Jackson | 382 | 41 | 423 |
| Jefferson | 0 | 351 | 351 |
| Jenkins | 741 | 50 | 791 |
| Lee | 0 | 279 | 279 |
| Lee Hall | 584 | 229 | 813 |
| Magruder | 2 | 760 | 762 |
| Marshall | 0 | 360 | 360 |
| Nelson | 737 | 31 | 768 |
| Newsome Park | 2 | 860 | 862 |
| Parkview | 622 | 27 | 649 |
| Reed | 0 | 646 | 646 |
| Reservoir | 677 | 104 | 781 |

| | *W* | *NW* | *Total* |
|---|---|---|---|
| Richneck | 599 | 118 | 717 |
| Riverside | 656 | 10 | 666 |
| Sanford | 734 | 21 | 755 |
| Saunders | 890 | 5 | 895 |
| Sedgefield | 696 | 11 | 707 |
| South Morrison | 920 | 34 | 954 |
| Washington | 1 | 796 | 797 |
| Wilson | 101 | 126 | 227 |
| Yates | 568 | 4 | 572 |
| Carver High | 0 | 1043 | 1043 |
| Denbigh High | 1556 | 307 | 1863 |
| Ferguson High | 1798 | 44 | 1842 |
| Huntington High | 0 | 2114 | 2114 |
| Menchville High | 1364 | 173 | 1537 |
| Newport News High | 929 | 564 | 1493 |
| Warwick High | 1914 | 25 | 1939 |

* * *

Elementary School Plan
Enrollment by School and Race—June 1971

| *School* | *White* | *Non-White* | *Total* |
|---|---|---|---|
| Briarfield | 646 | 5 | 651 |
| Carver (Grades 4-7) | 519 | 299 | 818 |
| Charles | 500 | 102 | 602 |
| Clark (Grades 1-3) | 600 | 2 | 602 |
| Deer Park | 36 | 92 | 128 |
| Denbigh (Grade 7) | 236 | 55 | 291 |
| Dunbar-Erwin | 17 | 1271 | 1288 |
| Epes (Grades 1-6) | 452 | 266 | 718 |
| Hidenwood | 674 | 21 | 695 |

| | *White* | *Non-White* | *Total* |
|---|---|---|---|
| Hilton | 351 | 2 | 353 |
| Jackson | 330 | 161 | 491 |
| Jefferson | 0 | 372 | 372 |
| Jenkins | 619 | 14 | 633 |
| Lee | 0 | 392 | 392 |
| Lee Hall | 740 | 185 | 925* |
| Magruder | 69 | 643 | 712 |
| Marshall | 0 | 388 | 388 |
| Nelson (Grades 1-6) | 670 | 15 | 685 |
| Newsome Park | 83 | 926 | 1009 |
| Palmer | 331 | 26 | 357 |
| Parkview (Grades 1-3) | 399 | 69 | 468 |
| Reed | 1 | 378 | 379 |
| Reservoir | 650 | 67 | 717* |
| Richneck (Grades 1-6) | 498 | 62 | 560 |
| Riverside | 626 | 21 | 647 |
| Sanford | 602 | 78 | 680 |
| Saunders | 683 | 3 | 686 |
| Sedgefield | 624 | 2 | 626 |
| South Morrison | 816 | 10 | 826 |
| Washington | 2 | 766 | 768 |
| Wilson (Grades 3-7) | 55 | 196 | 251 |
| Yates | 529 | 0 | 529 |

* Racial breakdown for Lee Hall and Reservoir estimated.

* * *

Administration of Zoning Plan

A zoning plan assigns pupils to schools under an entirely different concept from the free choice plan that has been in effect for the past six years. In order for such a plan to be effective it must be assumed that all pupils will be assigned

as zones indicate. However, limited administrative assignments may be made under the following conditions:

1. Persons living within a school zone shall be entitled to placement in the school serving that zone and all requests for transfer shall be considered after the opening of school.

2. First consideration shall be given to requests for transfer from a school in which the child is in the racial majority to a school in which he will be in the minority. Transportation will be provided by direct bus or through transfer from a reasonable pick-up point near the child's home to the school of assignment.

3. Next consideration will be given to children recommended for placement for medical or psychological reasons. All such cases will be considered by a committee to be appointed by the superintendent. The school physician and chief psychologist shall be members of this committee. Assignment of school will be made by the school system. Transportation will not be guaranteed but the pupil will be permitted to use available bus connections without special arrangements or scheduling.

4. Request for transfer for other reasons of personal hardship will be considered last. Transportation will not be guaranteed but the pupil will be permitted to use available bus connections without special arrangements or scheduling. Each such case will be considered by a committee to be appointed by the superintendent.

5. In the case of a family moving during the school year, the child shall be entitled to placement in the school serving his new zone of residence or he may be permitted to remain in his school of original placement for that school year. Transportation will not be guaranteed but the pupil will be

permitted to use available bus connections without special arrangements or scheduling.

6. All placements other than to the school serving the zone of residence shall be for the remainder of the school year and consideration for the following year will be by new application with no priority assigned for previous special placement.

7. All requests for transfer shall be submitted in writing to the office of the superintendent after August 20 for any given school year.

8. The above considerations as applied to resident pupils will take precedence over all non-resident pupils. Regardless of any other policy now in effect, any non-resident pupil admitted to the school system shall be assigned to a school by the office of the superintendent and shall have been considered by the same committee as the one appointed for personal hardship cases.

* * *

Secondary School Organization 1971-72

The city has been divided into seven geographic zones and students assigned to schools according to the grades and areas described below:

A. Pupils living in areas 2 and 4 will be assigned to:
Huntington Intermediate—Grades 8 and 9
Warwick High—Grades 10, 11 and 12

Area 2—That area of the city bounded by a line starting at Marshall Avenue and 48th Street—along and including 48th Street to Roanoke Avenue—along but not including Roanoke Avenue or Garden Drive but including Orcutt Avenue to Hampton Roads—along Hampton Roads to a

point opposite Marshall Avenue—along but not including Marshall Avenue to 39th Street—along and including Marshall Avenue from 39th Street to 48th Street.

Area 4—That area of the city bounded by a line starting at the Hampton city line at 50th Street—along and including 50th Street to Chestnut Avenue—along and including Chestnut Avenue to 48th Street—along but not including 48th Street to C&O Railroad—along C&O to 54th Street—along but not including 54th Street to James River—follow James River to bridge on Museum Drive—through Museum property to Copeland Lane—along and including Copeland Lane to Gatewood—from Copeland and Gatewood to Harpersville Road at C&O crossing—along and including Harpersville Road to Jefferson Avenue—along and including Jefferson Avenue to Dresden Drive—along and including Dresden Drive to Hampton city line—along Hampton city line to 50th Street.

B. Pupils living in areas 3 and 5 will be assigned to:
Newport News Intermediate—Grades 8 and 9
Ferguson High—Grades 10, 11 and 12

Area 3—That area of the city bounded by a line starting at Marshall Avenue and 48th Street—along but not including Marshall Avenue to 39th Street—along and including Marshall Avenue from 39th Street to Hampton Roads—along waterfront past piers and shipyard to 54th Street—along and including 54th Street to C&O tracks—along C&O to 48th Street—along and including 48th Street to Marshall Avenue.

Area 5—That area of the city bounded by a line starting at the Hampton city line and running along but not including Dresden Drive—along but not including Jefferson

Avenue to Harpersville Road—along but not including Harpersville Road to C&O—from C&O to Gatewood Drive at Copeland Lane—along but not including Copeland Lane through Museum to bridge on Museum Drive—along James River to Fishers Creek—along Fishers Creek to Shapiro Court—a line from this point to intersection of Deep Creek Road and Hermitage Road—along but not including Deep Creek Road to Warwick Boulevard—along but not including Warwick Boulevard to Middlesex Road—along and including Middlesex Road to C&O tracks—along C&O to J. Clyde Morris Boulevard—along center of J. Clyde Morris Boulevard including all of Traverse Road to York County line—along York and Hampton lines to Dresden Drive.

C. Pupils living in areas 1 and 6 will be assigned to:
Carver Intermediate—Grades 8 and 9
Menchville High—Grades 10, 11 and 12

Area 1—That area of the city bounded by a line starting at the Hampton city line and running along Hampton Roads to Orcutt Avenue—from Hampton Roads including Garden Drive but not including Orcutt Avenue to Roanoke Avenue—along and including Roanoke Avenue to 48th Street—along and including 48th Street to Chestnut Avenue—along but not including Chestnut Avenue to 50th Street—along but not including 50th Street to Hampton city line—along Hampton city line to Hampton Roads.

Area 6—That area of the city bounded by a line starting on J. Clyde Morris Boulevard at the York County line—running down center of J. Clyde Morris Boulevard excluding all of Traverse Road to C&O—along C&O to Middlesex Road—along but not including Middlesex to Warwick Boulevard—along and including Warwick Boulevard to Deep Creek Road—along and including Deep Creek Road to

Hermitage Road—along a line running to Fishers Creek opposite Shapiro Court—along Fishers Creek to river—along Warwick River to Lucas Creek—along Lucas Creek to end of Wells Road—along and including Wells Road to Old Courthouse Way—along but not including Old Courthouse Way to Tabbs Lane—along and including Campbell Road and Campbell Lane to C&O and then to York line east of Patrick Henry Hospital—along York County line to J. Clyde Morris Boulevard.

D. Pupils living in area 7 will be assigned to:
Denbigh High—Grades 8, 9, 10, 11 and 12

Area 7—That area of the city north and west of area 6 including all of Fort Eustis.

## Enrollment by Grade and Race—June 1971

Huntington Intermediate 8-9
Warwick High 10-12

| | (8-9) | | | (10-12) | | |
|---|---|---|---|---|---|---|
| | *W* | *N* | *T* | *W* | *N* | *T* |
| No. 2 | 24 | 418 | 442 | 10 | 562 | 572 |
| No. 4 | 816 | 74 | 890 | 1046 | 129 | 1175 |
| Total | 840 | 492 | 1332 | 1056 | 691 | 1747 |
| | 63% | 37% | | 60% | 40% | |

Newsport News Intermediate 8-9
Ferguson High 10-12

| | (8-9) | | | (10-12) | | |
|---|---|---|---|---|---|---|
| | *W* | *N* | *T* | *W* | *N* | *T* |
| No. 3 | 91 | 592 | 683 | 90 | 690 | 780 |
| No. 5 | 740 | 13 | 753 | 964 | 27 | 991 |
| Total | 831 | 605 | 1436 | 1054 | 717 | 1771 |
| | 58% | 42% | | 60% | 40% | |

Carver Intermediate 8-9
Menchville High 10-12

| | (8-9) | | | (10-12) | | |
|---|---|---|---|---|---|---|
| | *W* | *N* | *T* | *W* | *N* | *T* |
| No. 1 | 48 | 441 | 489 | 53 | 576 | 629 |
| No. 6 | 847 | 37 | 884 | 1007 | 64 | 1071 |
| Total | 895 | 478 | 1373 | 1060 | 640 | 1700 |
| | 65% | 35% | | 62% | 38% | |

Denbigh High 8-12

| | (8-12) | | |
|---|---|---|---|
| | *W* | *N* | *T* |
| No. 7 | 1468 | 328 | 1796 |
| | 82% | 18% | |

* * *

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## SUPPLEMENTAL PLAN FOR DESEGREGATION OF THE NEWPORT NEWS ELEMENTARY SCHOOLS

**Filed August 6, 1971**

| | *Zones Grades 1 & 2* | *Zones Grades 3,4,5* | *Zones Grades 6 & 7* |
|---|---|---|---|
| Briarfield | 16,17 | None | 16,17,21,23,34 |
| **Carver | None | 19 | 19 |
| Charles | 33 | 33,10 | None |
| Clark-Wilson | 1 | None | 1,30 |
| Deer Park | 26 | 26,11 | None |
| Denbigh | 35 | 35,20 | None |
| Dunbar-Erwin | 3,4,5,6,7,9 | None | 3,4,5,6,7,27,28,29 |
| Epes | 36 | 36,14 | None |
| Hidenwood | 28 | 28,5 | None |
| Hilton | 20 | None | 20,35 |
| Jackson | 15 | None | 15,9,31 |
| Jefferson | 13 | None | 13,32 |
| Jenkins | 32 | 32,13 | None |
| Lee | 11 | None | 11,26 |
| **Lee Hall | None | 38 | 38 |
| Magruder | 2 | None | 2,24 |
| Marshall | 10 | None | 10,33 |
| Nelson | 37 | 37,18 | None |
| Newsome Park | 14,18 | None | 14,18,36,37 |
| Palmer | 30 | 30,1,15 | None |
| *Parkview | 19 | 19 | None |
| *Reservoir | 38 | 38 | None |
| Richneck | 31 | 31,9 | None |
| Riverside | 27 | 27,4,6 | None |
| Sanford | 34 | 34,17 | None |
| Saunders | 25 | 25,12 | None |
| Sedgefield | 21,22,23 | 21,22,23,16,8 | None |
| South Morrison | 24 | 24,2 | None |
| Washington | 8,12 | None | 8,12,22,25 |
| Yates | 29 | 29,3,7 | None |

* Grades 1,2,3
** Grades 4,5,6,7

* * *

## Anticipated Enrollments 1971-72—Zone-Pairing Plan

| | Gr. 1 &2 W N T | Gr. 3,4,5 W N T | % Negro | Gr. 6 & 7 W N T | % Negro | School Total W N T | % Negro |
|---|---|---|---|---|---|---|---|
| Briarfield | 190-108-298 | — | — | 410-117-527 | 22.2 | 600-225-825 | 27.3 |
| Charles | 186- 0-186 | 287-163-450 | 36.2 | — | — | 473-163-636 | 25.6 |
| Clark-Wilson | 24- 86-110 | — | — | 116-114-230 | 49.6 | 140-200-340 | 58.8 |
| Deer Park | 192- 0-192 | 290-165-455 | 36.3 | — | — | 482-165-647 | 25.5 |
| Denbigh | 0- 56- 56 | 146- 99-245 | 40.4 | — | — | 146-155-301 | 51.4 |
| Dunbar-Erwin | 2-510-512 | — | — | 567-346-913 | 37.9 | 569-856-1425 | 60.1 |
| Epes | 196- 18-214 | 299-215-514 | 41.8 | — | — | 495-233-728 | 32.0 |
| Hidenwood | 156- 8-164 | 272-237-509 | 46.5 | — | — | 428-245-673 | 36.4 |
| Hilton | 86- 0- 86 | — | — | 116- 65-181 | 35.9 | 202- 65-267 | 24.3 |
| Jackson | 88- 30-118 | — | — | 244-196-440 | 44.5 | 332-226-558 | 40.5 |
| Jefferson | 0-128-128 | — | — | 163- 99-262 | 37.8 | 163-227-390 | 58.3 |
| Jenkins | 188- 8-196 | 291-168-459 | 36.6 | — | — | 477-176-655 | 26.9 |
| Lee | 0-126-126 | — | — | 167-121-288 | 42.0 | 167-247-414 | 59.7 |
| Magruder | 22-222-244 | — | — | 276-223-499 | 44.7 | 298-445-743 | 59.9 |
| Marshall | 0-148-148 | — | — | 136-103-239 | 43.1 | 136-251-387 | 64.8 |
| Nelson | 202- 0-202 | 295-206-501 | 41.1 | — | — | 497-206-703 | 29.3 |
| Newsome Park | 24-300-324 | — | — | 409-296-705 | 42.0 | 433-596-1029 | 57.9 |
| Palmer | 92- 8-100 | 343-185-528 | 35.0 | — | — | 435-193-628 | 30.7 |
| Richneck | 130- 26-156 | 275-179-454 | 39.4 | — | — | 405-205-610 | 33.6 |
| Riverside | 128- 0-128 | 275-182-457 | 39.8 | — | — | 403-182-585 | 31.1 |
| Sanford | 128- 30-158 | 427-124-551 | 22.5 | — | — | 555-154-709 | 21.7 |
| Saunders | 168- 2-170 | 325-190-515 | 36.9 | — | — | 493-192-685 | 28.0 |
| Sedgefield | 136- 0-136 | 361-164-525 | 31.2 | — | — | 497-164-661 | 24.8 |
| South Morrison | 174- 0-174 | 395-269-664 | 40.5 | — | — | 569-269-838 | 32.1 |
| Washington | 0-130-130 | — | — | 278-205-483 | 42.4 | 278-335-613 | 54.7 |
| Yates | 126- 0-126 | 229-166-395 | 42.0 | — | — | 355-166-521 | 31.8 |

| | Gr. 1,2,3 W N T | Gr. 4,5,6,7 W N T | % Negro |
|---|---|---|---|
| Parkview | 363- 69-432 | — | 16.0 |
| Carver | — | 513- 99-612 | 16.2 |
| Reservoir | 642-120-762 | — | 18.6 |

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FILED

JAN 19 1973

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-667

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THE SCHOOL BOARD OF
THE CITY OF NEWPORT NEWS, VIRGINIA, *et al.*,

*Petitioners,*

—v.—

FRANK V. THOMPSON, *et al.*

---

## BRIEF IN OPPOSITION TO CERTIORARI

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IN THE

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THE SCHOOL BOARD OF
THE CITY OF NEWPORT NEWS, VIRGINIA, *et al.*,

*Petitioners,*

—v.—

FRANK V. THOMPSON, *et al.*

---

## BRIEF IN OPPOSITION TO CERTIORARI

### Opinions Below

The opinion of the United States Court of Appeals for the Fourth Circuit, filed August 2, 1972, is now reported at 465 F.2d 83. The unreported August 12, 1971 oral opinion of the District Court and its order endered August 23, 1971, are reprinted at pp. 15 and 23, respectively, of the Appendix to the Petition.

There are no prior reported opinions in this case; however, opinions in a predecessor action, *Adkins* v. *School Board of Newport News,* are reported at 148 F. Supp. 430 (E.D. Va.), *aff'd* 246 F.2d 325 (4th Cir.), *cert. denied,* 355 U.S. 855 (1957).

## Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## Questions Presented

(1) Whether residential segregation in Newport News, which predated the commencement of this litigation and which continues virtually unabated to any substantial degree, excuses the school authorities from dismantling segregated units of their former dual school system which are located in segregated neighborhoods.

(2) Whether the courts below erred in holding that a freedom-of-choice plan had failed to bring about effective desegregation of the Newport News public schools.

(3) Whether the Court of Appeals erred in remanding, for further findings, the District Court's action exempting all first- and second-graders from inclusion in the desegregation process, irrespective of the particular time or distance any individual student or group of students of any age might have to be transported.

(4) Whether a school system which previously transported nearly 70% of its enrollment may avoid effectively desegregating its schools because it contends that transportation of students to achieve desegregation will subject them to dangerous conditions because of congested traffic patterns.

## Statement of the Case

The essential facts concerning this matter are as follows:

This suit was commenced July 23, 1970 to desegregate the public schools of Newport News.[1] Proceedings were initially deferred pending this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971); thereafter, the School Board submitted a plan calling for retention of freedom-of-choice at the secondary school level, and "neighborhood" (generally segregated) zoning for elementary schools. The Board also presented an alternate secondary plan (which it did not favor) utilizing pairing and non-contiguous zoning to desegregate all secondary facilities in the system.

Following a hearing, the District Court on August 4, 1971 rejected the Board's proposal to continue freedom-of-choice at the secondary level but accepted the alternate secondary desegregation plan. At the same time, the Court

[1] A decade before, black schoolchildren had brought suit to declare unconstitutional the Virginia pupil placement laws enacted in response to *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954); 349 U.S. 294 (1955), and to start the process of desegregation in Newport News. *Adkins* v. *School Bd. of Newport News*, 148 F. Supp. 430 (E.D. Va.), *aff'd* 246 F.2d 325 (4th Cir.), *cert. denied*, 355 U.S. 855 (1957). Following merger of the Cities of Warwick and Newport News in 1958 (Petition, p. 9), a second suit seeking the same relief was brought against the new entity, *Adkinson* v. *School Bd. of Newport News*, Civ. No. 642 (E.D. Va., Newport News Div'n, filed September 3, 1958). These suits did not result in orders for system-wide desegregation and their prosecution languished in the 1960's. Following enactment of the Civil Rights Act of 1964, 42 U.S.C. §§2000d *et seq.*, the Newport News school system adopted a freedom-of-choice plan. This proved ineffective as a desegregation device and the U.S. Department of Health, Education and Welfare had virtually completed procedures to terminate federal funding to the district when the District Court's order in the instant case was entered. *See* U.S. Dep't of H.E.W., *Status of Title VI Compliance: Interagency Report*, Cumulative List No. 254, p. 4 (Docket No. CR 669).

required submission of a new elementary plan by the school system. This plan, ultimately approved by the District Court, retained "neighborhood" zoning for students in grades 1 and 2 while utilizing non-contiguous pairing to desegregate the remaining elementary grades.

Both parties appealed: the School Board claiming it had been required to do too much, and the plaintiffs that a unitary school system could not be achieved under the plan approved by the District Court. In the meantime, both the Board's alternate secondary school and revised elementary school desegregation plans were implemented commencing with the 1971-72 school year.

On August 2, 1972, the United States Court of Appeals for the Fourth Circuit, sitting *en banc,* rejected the Board's appeal virtually in its entirety and remanded the case to the District Court with instructions to make findings concerning two issues raised by plaintiffs: whether under the School Board's elementary plan, as to the grades it affected, black students were bearing a disproportionate share of the burden of desegregation; and whether any sufficient ground existed to eliminate the first and second grades from the desegregation process, particularly if the plaintiffs could present a viable and practicable alternative elementary plan including those grades.

## Reasons Why the Writ Should Be Denied

Petitioners attack the desegregation order of the District Court on every possible ground, contending: that they did not operate a dual school system, that in any event the Court was bound to permit continuation of a free choice plan which had not effectively desegregated their schools, that Newport News streets and highways are so grossly inadequate to transport students to desegregated schools

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that the District Court exceeded its remedial equitable authority by ordering a plan requiring pupil busing, and finally, that the Court of Appeals should not have required further findings to justify blanket exemption of first- and second-grade students from whatever plan of desegregation is required to be implemented.

## I.

The first two and last two "Questions Presented" described in the Petition (pp. 2-3), and the confusing discussion at pp. 13-23 thereof, represent an attempt by the Petitioners to cloud the remedial issues of the case by making the bald and unsupportable claim that no violation of the Fourteenth Amendment was shown warranting relief in the nature of that authorized by this Court in *Swann*. The School Board presents alternate theses to support this rationale: that its freedom-of-choice plan was working and its schools were not segregated; and that its school segregation had nothing to do with discrimination or its past operation of a dual school system.

Petitioners cannot seriously contend that their schools were not substantially segregated at the time this action was commenced. In the 1970-71 school year, 13 of the system's 39 schools were virtually all-black.[2] Petitioners' counsel as much as conceded that freedom of choice had been inadequate at the District Court hearing of June 16, 1971 when he said:

> . . . if the sole basis for determining whether the freedom of choice plan is valid in Newport News is a racial

[2] The failure of the freedom-of-choice plan to produce meaningful results led the Department of Health, Education and Welfare to conduct enforcement proceedings under Title VI of the Civil Rights Act of 1964 for the purpose of terminating federal financial assistance to the school district. *See* n. 1, *supra*.

> black-white ratio question, then we would agree that it has no chance of passing. (A. 7)[3]

Of course, this Court held in *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430, 441 (1968), that where freedom-of-choice plans had produced results comparable to those in Newport News—in terms of numbers—then the availability of alternatives promising greater desegregation—again in terms of numbers—must be explored.[4] The District Court in this case was clearly correct in rejecting a continuation of freedom of choice where the Board itself submitted a feasible alternative plan which promised full desegregation *at once.*

Petitioners were equally unsuccessful below in establishing that the 1970 segregation in their schools was unrelated to their previous operation of a dual school system.[5] To meet their burden under *Swann*, 402 U.S. at 26, they presented only the testimony of the School Superintendent,[6]

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[3] Citations are to the printed Appendix in the Court of Appeals.

[4] The notion that *Green* and *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) were limited in application to small, rural school systems, (Petition, p. 20), was laid to rest in *Northcross* v. *Board of Educ. of Memphis*, 397 U.S. 232 (1970).

[5] Obviously, they could not contend that at some time between 1957 and 1970 they had implemented an efficacious plan and had "achieved full compliance with this Court's decision in *Brown I*." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ., supra*, 402 U.S. at 31. The only desegregation device ever employed in Newport News, freedom of choice, was concededly inadequate under the standards of *Green*.

[6] The Petition asserts that the Superintendent was qualified as a historical expert for the purpose of his testimony but no such representation was made to the District Court. The entire expert "qualification" is as follows:

> Q. Mr. McIntosh, do you know of anyone else that knows any more or as much about the Newport News School System as you do? A. No, sir.

who claimed that the racial characteristics of student enrollments in Newport News public schools were determined solely by long-standing patterns of racial residential concentration. The Superintendent did not and could not testify that Newport News had not operated a dual school system, but he ignored the continuing effect of the long-standing practice of faculty and pupil segregation as well as school site location and other policy decisions made with full knowledge of the residential segregation. *See Swann*, 402 U.S. at 20-21.[7]

Residential segregation in Newport News antedates this lawsuit, and the School Board was well aware of it in designing its segregated "neighborhood" zones. But desegregation plans "cannot be limited to the walk-in school," *Swann*, 402 U.S. at 30. The existence of continuing or even changing patterns of residential segregation in a school district which has never acted affirmatively to effectively dismantle its racially segregated system does not alter the constitutional obligation of school authorities. *E.g., Henry* v. *Clarksdale Municipal Separate School Dist.*, 409 F.2d 682 (5th Cir.), *cert. denied*, 396 U.S. 940 (1969); *Kelley* v. *Metropolitan County Bd. of Educ.*, 463 F.2d 732, 744 (6th Cir.), *cert. denied*, 41 U.S.L.W. 3254 (1972); *Clark* v. *Board of Educ.*, 426 F.2d 1035 (8th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971); *Dowell* v. *Board of Educ.*,

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Mr. Beale: If your Honor please, I tender the witness as an expert in the educational field—

The Court: Yes.

Mr. Beale: —and, in particular, upon the Newport News School System.

The Court: You may proceed. (A. 28).

[7] The Superintendent's denial that today's segregation in the Newport News public schools relates to yesterday's racial discrimination is essentially the same as the characteristic denial of discrimination voiced by jury commissioners. *See Norris* v. *Alabama*, 294 U.S. 587, 598 (1935); *Turner* v. *Fouche*, 396 U.S. 346, 361 n. 21 (1970), and cases cited.

465 F.2d 1012 (10th Cir.), *cert. denied,* 41 U.S.L.W. 3313 (1972); *Flax* v. *Potts,* 464 F.2d 865 (5th Cir.), *cert. denied,* 41 U.S.L.W. 3274 (1972).

## II.

Petitioners also claim that inadequate traffic arteries in Newport News are so congested that no desegregation plan involving the transportation of students at the elementary level could properly have been ordered by the District Court.

The pairing plan for elementary school grades 3-7 has been in effect for a year and a half in Newport News; yet on no occasion has the school district encountered the grave and serious problems which it told the District Court it was anticipating with the pupil transportation required to desegregate its schools. The school district has not found it necessary to request any modification of the plan based on practical problems it was actually encountering in implementation. Thus, this case is much like *Kelley* v. *Metropolitan County Bd. of Educ., supra,* and *Flax* v. *Potts, supra,* in which school boards sought to attract attention with inflated claims of danger and chaos which simply did not materialize when desegregation plans were carried out.

The Court of Appeals considered Petitioners' arguments[8] in great detail and with considerable sympathy but found nothing to suggest the District Court had erred in requiring implementation of an elementary school desegregation

[8] The cases relied upon by Petitioners are inapposite. *Ross* v. *Eckels,* 434 F.2d 1140 (5th Cir. 1970) was a pre-*Swann* decision consistent with *Davis* v. *Board of School Comm'rs,* 430 F.2d 883, 889 (5th Cir. 1970), *rev'd* 402 U.S. 33 (1971). The District Court decision in *Calhoun* v. *Cook* has been reversed, No. 72-2453 (5th Cir., November 24, 1972).

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plan involving pupil transportation for grades 3-7; the Court said "the objections of the school district are without merit."

During the 1970-71 school year, preceding implementation of the District Court's order, the system transported 22,000 of its 31,500 students, including 12,900 elementary students (A. 50,129); as the District Court noted, many school buses in Newport News were already crossing the "dangerous intersections" which Petitioners contend here, and contended below, are so unsafe that a desegregation plan requiring a school bus to traverse them ought not be effected.

The district courts retain jurisdiction in school desegregation cases, *Raney* v. *Board of Educ.*, 391 U.S. 443 (1968), and like any courts of equity, *Swann, supra,* their decrees are always subject to modification. If the School Board is experiencing great difficulty in implementing the District Court's order, it should take the matter up with that Court; its failure to do so for a year and a half thoroughly supports the action of the District Court in requiring desegregation.

## III.

Finally, Petitioners contended below that since pupil transportation was necessary, elementary schools should not be desegregated because the additional time required would be harmful to the health of young children.

Although 12,900 elementary students in Newport News were already bused (to segregated schools), Petitioners did not differentiate between potential harm to these children and to those students who previously walked to class. Instead, they presented the testimony of a pediatrician, in

general practice for five years, who responded to a hypothetical question based upon the *average system-wide travel time* under Petitioners' plan, and recommended rest or nap periods for younger children (A. 60).[9] He was unfamiliar with the details of the plan or the amounts of time elementary pupils spent getting to school prior to desegregation (A. 65).

The District Court found the testimony unconvincing (A. 149) but decided to exempt first- and second-graders on its own:

> . . . the reason that I think it is important to keep children in the first and second grades in the neighborhood area is that *while it is not supported by any testimony in this case,* I am old-fashioned enough to think that it is vitally important that a child, starting his or her public education, should commence the same with some degree of happiness and satisfaction, including some degree of comfort on the part of the parent . . . (A. 150) (emphasis added).

The Court of Appeals remanded with instructions that further findings were necessary to support the District Court's action, noting with respect to the "medical" testimony that if "there is any credible evidence along this line developed on remand, the District Court may give such consideration to it as it finds is warranted," 465 F.2d at 88, n.7.[10]

Petitioners' complaint apparently is that the Courts below should have refused to order any elementary desegregation on the basis of the evidence that long school days

[9] The school system schedules rest periods for first and second graders (A. 68).

[10] Thus, there is no need for this Court to review the issue until it is finally resolved below.

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without sufficient rest periods might be detrimental to the health of young children—even though that opinion was not linked to the additional transit time required of specified students or groups of students but was advanced as equally affecting all pupils. We think the Court of Appeals was more than justified in remanding—and in fact should properly have directed inclusion of the first two grades. The general principle recognized in all of the Circuits which have decided the question is that desegregation plans must affect all grades absent compelling justification for specific exemption. *E.g., Flax* v. *Potts, supra; Clark* v. *Board of Educ.*, 465 F.2d 1044 (8th Cir. 1972), *cert. pending.*

## CONCLUSION

WHEREFORE, for the foregoing reasons, Respondents respectfully pray that the Writ be denied.

Respectfully submitted,

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